No. 87-1112-AFX Title: Frank V. Ponterio, Appellant
Status: GRANTED v.
Beverly Morris, Joy Clarke Holmes and Joanne Oplustil

Docketed:
December 31, 1987 Court: United States Court of Appeals for the Second Circuit

Vide:
87-1022 Counsel for appellant: Minardo,Philip G.

Counsel for appellee: Emery,Richard

NOTE: Notice of Appeal filed 12/16/87

Entry	Date	Note	Proceedings and Orders
1	Dec 31 1987	G	Statement as to jurisdiction filed.
2	Dec 31 1987		Appendix of appellant Frank Ponterio filed.
3	Feb 3 1988		DISTRIBUTED. February 19, 1988
4	Feb 17 1988	F	Response requested -- HAB.
7	Mar 3 1988		Letter from counsel for appellees'indicating that Motion to Affirm in 87-1022 addresses the issues in this case.
5	Mar 16 1988		REDISTRIBUTED. April 1, 1988
6	Apr 4 1988		PROBABLE JURISDICTION NOTED. The case is consolidated with 87-1022, and a total of one hour is allotted for oral argument.
			**********
9	May 12 1988		Order extending time to file brief of appellant on the merits until June 13, 1988.
10	Jun 10 1988		Brief of appellant Frank Ponterio filed.
11	Jun 13 1988		Joint appendix filed. VIDED.
		*	Volumes I and II
12	Jun 13 1988		Brief of appellants The Board of Estimate, et al. filed. VIDED.
13	Jun 13 1988		Brief amicus curiae of John Banzhaf filed. VIDED.
15	Jun 13 1988		Brief amici curiae of Abraham D. Beame, et al. filed.
14	Jun 15 1988		Order extending time to file brief of appellee on the merits until August 3, 1988.
16	Jun 22 1988		Record filed.
		*	Certified copy of original record and proceedings, box, received.
17	Aug 3 1988		Brief amici curiae of Peter F. Vallone, et al. filed. VIDED.
18	Aug 3 1988		Brief of appellees filed. VIDED.
20	Aug 3 1988		Brief amicus curiae of Citizens Union of the City of New York filed. VIDED.
19	Aug 5 1988		Lodging received. (Vide 87-1022).
21	Aug 12 1988		CIRCULATED.
22	Aug 19 1988		Application for an extension of time within which to file a reply brief filed by appellants(A-153).
24	Sep 26 1988	X	Reply brief of appellant Frank Ponterio filed. VIDED.
23	Sep 27 1988	X	Reply brief of appellants Board of Estimates City of New York, et al. filed. VIDED.
25	Sep 30 1988		Set for argument. Wednesday, December 7, 1988. This case is consolidated with 87-1022. (3rd case) (1 hr.)
26	Oct 21 1988	D	Motion of appellant Frank V. Ponterio for divided

o. 87-1112-AFX

ntry	Date	Note	Proceedings and Orders
			argument and for additional time for oral argument filed.
27	Oct 31 1988		Response by appellee to motion of appellant Ponterior for additional time for oral argument filed.
28	Nov 2 1988		Opposition of petitioner Board of Estimate to motion of appellant Frank V. Ponterio for divided argument and for additiona filed.
29	Nov 7 1988		Motion of appellant Frank V. Ponterio for divided argument and for additional time for oral argument DENIED.
	Dec. 7 1988		Argued

87 1112

No. _____

Supreme Court, U.S.
FILED
DEC 31 1987
JOSEPH F. SPANIOL, JR.
CLERK

Supreme Court of the United States
OCTOBER TERM, 1987

FRANK V. PONTERIO,

Appellant,

v.

BEVERLY MORRIS, JOY CLARKE HOLMES, and JOANNE OPLUSTIL,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED FOR REVIEW

Whether the combination of at-large and local members of the Board of Estimate in the context of the voting procedures of the Board, creates a system of representation that satisfies constitutional standards for instruments of local government.

THE PARTIES TO THE PROCEEDINGS BELOW

The following parties and *amici curiae* participated in the proceedings before the Court of Appeals:

(i) *Plaintiffs-Appellees:* Beverly Morris, Joy Clarke Holmes, Joanne Oplustil

(ii) *Defendants-Appellants:* THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of New York, ANDREW STEIN, individually and as City Council President, HARRISON J. GOLDIN, individually and as comptroller for the City of New York, HOWARD GOLDEN, DAVID N. DINKINS, FERNANDO FERRER, CLARE SHULMAN, RALPH J. LAMBERTI, each individually and as Borough Presidents of the boroughs of the City of New York,

(iii) *Intervenor-Defendant-Appellants:* Frank V. Ponterio; Robert A. Straniere, individually and as a member of the New York State Assembly

(iv) *Amici Curiae:* John J. Marchi, John F. Banzhaf III, Staten Island League for Better Government, Citizens Union of the City of New York, Peter F. Vallone and other members of the New York City Council

The Municipal defendants and intervenor Straniere have joined in a separate, companion appeal to this Court.

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Supreme Court of the United States
OCTOBER TERM, 1987

FRANK V. PONTERIO,

Appellant,

v.

BEVERLY MORRIS, JOY CLARKE HOLMES, and JOANNE OPLUSTIL,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit, dated October 8, 1987, is reported at 831 F.2d 384 (A5) (Numbers in parentheses preceded by the letter "A" refer to the Appendix submitted with this Jurisdictional Statement).

The decisions of the United States District Court for the Eastern District of New York, dated August 21, 1984 and November 16, 1986, are reported at 592 F. Supp. 1462 and 647 F. Supp. 1463 (A55, A119).

The trial court's rulings came upon remand from the Court of Appeals for the Second Circuit, which, in a decision dated May 16, 1983, held that the New York City Board of Estimate is subject to the one-person, one-vote principle. This decision, which reversed the initial judgment entered by the trial court, is reported at 707 F.2d 686 (A186).

The first decision of the United States District Court for the Eastern District of New York is reported at 551 F. Supp. 652 (A208).

JURISDICTION

Alleging that the composition and voting structure of the New York City Board of Estimate, as set forth in sections 61 and 62 of the New York City Charter, violates the equal protection clause of the United States Constitution, plaintiffs-appellees Morris, *et al.* sought declaratory and injunctive relief pursuant to 28 U.S.C. Sections 2201 and 2202. Appellees predicated jurisdiction in the trial court upon 28 U.S.C. Sections 1331 and 1343.

The judgment of the United States Court of Appeals for the Second Circuit was entered on October 8, 1987 affirming the trial court's grant of plaintiffs' motion for summary judgment.

A Notice of Appeal to this Court on behalf of Intervenor-Defendant-Appellant Frank V. Ponterio was timely served and filed in the Court of Appeals for the Second Circuit on December 16, 1987. The municipal appellants and Intervenor-Defendant-Appellant Robert A. Straniere served and filed notices of appeal on October 15, 1987 and November 6, 1987 respectively.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. Section 1254(2) in that the Court of Appeals held a state statute to violate the United States Constitution.

CONSTITUTIONAL PROVISION AND STATE STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The New York City Charter:

Section 61: *Membership.* The mayor, the comptroller, the president of the Council, and the presidents of the boroughs shall constitute the board of estimate.

Section 62: *Voting in the board.*

a. As members of the board of estimate, the mayor, the comptroller and the president of the council shall each be entitled to cast two votes, and the president of each borough shall be entitled to cast one vote.

b. Except as otherwise provided in this charter or by law, the board shall act by resolution adopted by a majority of the whole number of votes authorized to be cast by all the members of the board.

c. No resolution or amendment of any resolution shall be passed at the same meeting of the board at which

it is originally presented unless by a three-fourths vote or shall be finally passed except at a meeting open to the public. Prior to a final vote by the board on any resolution or amendment of any resolution members of the general public shall be afforded the opportunity to be heard on such resolution or amendment.

d. A quorum of the board shall consist of a sufficient number of members thereof to cast six votes, including at least two of the members authorized to cast two votes each.

STATEMENT OF THE CASE

Appellees (plaintiffs below), residents of the Borough of Brooklyn within the City of New York, commenced this action in December 1981 seeking declaratory and injunctive relief to remedy their alleged underrepresentation on the Board of Estimate. The Board of Estimate is a municipal body composed of 8 *ex officio* members: the Mayor, Comptroller, City Council President (each of whom has 2 votes on the Board), and the Presidents of 5 boroughs of the City (each of whom has 1 vote on the Board). Plaintiffs complain that equal votes for all borough Presidents, notwithstanding unequal borough populations, results in a constitutionally unacceptable malapportionment of the Board.

Appellant Ponterio, a resident of Staten Island, intervened as a defendant in March 1982. Ponterio believed his participation could help to resolve the unique analysis issues inherent in this case by virtue of his qualifications as an attorney and as an engineer with over 30 years of experience, primarily in mathematical analysis of complex systems.

Appellees moved for summary judgment in April 1982, and appellants cross moved. On December 1, 1982, the trial court granted appellants' motion dismissing the complaint on the ground that, as a matter of law, the Board is not subject to the one person, one vote doctrine. On May 16, 1983, the Court of Appeals for the Second Circuit reversed and remanded the case for a hearing on whether the Board, as constituted, offends the equal protection clause.

Upon remand, the trial Court bifurcated the case; first to decide upon an appropriate methodology for quantifying malapportionment and the resultant deviation, and second to rule on whether legitimate state interests justified such deviation. Appellant Ponterio submitted proposed analysis methodologies showing malapportionment to be within acceptable bounds and moved to deem methodology issues resolved. Appellees moved for summary judgment on the basis of an alleged deviation of 132.9% obtained by excluding the at-large members from the analysis and computing deviations of actual borough populations from an "ideal" borough population (i.e., one-fifth of the City population). The trial Court issued a Memorandum and Order adopting Appellees' methodology and deviation percentage.

Subsequently, the parties and *amici* submitted memoranda of law and affidavits on the justification issue. Appellees re-raised the methodology issue by admitting that a different method, district voting power, is a constitutionally acceptable means for apportioning and analyzing the Board, and presenting a proposed Board reapportionment following (albeit incorrectly) voting power principles. Appellant Ponterio responded with several voting power analyses showing the Board to be apportioned within constitutional bounds and challenging

Appellees' computations as erroneous. Several rounds of argument and counter-argument by Appellant Ponterio and Appellees ensued. No other parties participated in these exchanges.

On November 19, 1986, the district court ruled that defendants had failed to justify the adjudged deviation of 132.9%, while acknowledging the legitimacy of historic, geographic and functional reasons advanced in support of the Board's composition and voting system. The court noted the existence of alternative plans with smaller deviations from strict voter equality that would substantially further those state interests. The court did not address the voting power arguments raised by intervenor Ponterio during the justification phase even though those arguments were submitted with the Court's approval.

On October 8, 1987 the Second Circuit affirmed. The Court of Appeals (per Oakes, J.) held that "in calculating voter equality for equal protection purposes the City-wide members should be, if not ignored, not considered in the appropriate analysis" (A33). In a separate concurrence, Judge Newman, while joining the majority, opined that in some circumstances the equal protection clause might permit local governments to combine "dominant" at-large members with single-member districts of different populations (A51-53).

This appeal followed.

REASONS FOR PLENARY CONSIDERATION BY THE SUPREME COURT

This appeal raises issues of first impression in apportionment law. Never before has any court been asked to rule upon the constitutionality of a governmental body that combines at-large and local members such that, in virtually every voting circumstance, the at-large members hold a controlling majority of votes. Never before has there been a case involving a governmental body whose composition, voting procedures, and functions are so specifically tailored to the unique requirements of a huge and diverse metropolis like New York City. Never before has a case made so manifest the lingering uncertainties in the one person, one vote doctrine and the fundamental inapplicability of traditional apportionment analysis methods to a specialized instrument of local government. No other case of such importance has been so summarily decided. Plenary consideration by this court is warranted to protect the rights of New York City's 7 million residents and to resolve unsettled apportionment issues.

THE COURT OF APPEALS ERRED IN AFFIRMING A DECISION ON A SUMMARY JUDGMENT MOTION WHEN CONTESTED ISSUES OF MATERIAL FACTS WERE PRESENTED.

On remand after the first appeal of this action the District Court held a scheduling conference in which it was agreed that defendants, having the burden of proof, would submit briefs on methodology issues and plaintiffs would respond. Rather than respond to defendants' briefs, plaintiffs moved for summary judgment asserting the applicability of unmodified *Abate* analyses (following *Abate v. Mundt*, 403 U.S. 182 (1971)). Before responses to plaintiffs' motion were completed, a pre-trial status conference was ordered for February 1, 1984. At that con-

ference, Judge Neaher stated that he was considering ordering a trial or hearing so that a complete record on methodology issues could be made. No trial or hearing was held. Instead, in August 1984 he issued a Memorandum and Order adopting the unmodified *Abate* method, without notice and without providing any opportunity for factual or other testimony. His choice of methodology was based on an observation that since there is a single tier of borough representatives on the Board, viz., the five Borough Presidents, *Abate* method percent deviations should be calculated among those five members alone (A149). Judge Neaher decided that the Second Circuit was mistaken in believing that the Board's design raises novel apportionment issues (A136) and ruled out consideration of any method that takes into account the presence on the Board of the 3 at-large members (A179 at n. 8).

By contrast, the Court of Appeals premised its selection of the unmodified *Abate* method on findings of facts that are not supported by a single word of testimony or other competent evidence in the record, i.e., that "citywide Board members and borough presidents represent different interests (A30); that "borough presidents sit on the Board of Estimate as representatives of the special concerns their constituents have *qua* residents of a particular borough" (A32), and that "City-wide members . . . must be supposed . . . to represent . . . the interests of their constituents *qua* residents of New York City (A32). The only competent evidence in the record is precisely to the contrary. In the justification phase of these proceedings Mayor Edward I. Koch submitted an affidavit in which he specifically denies the existence of a two-tiered Board. Borough President Ralph J. Lamberti submitted an affidavit in which he states that his representation is not limited to only the parochial interests of Staten Island residents (but also encompasses the interests of all citizens of New York City).

No citizens testified. Apart from the Koch and Lamberti affidavits, no board members testified. The Court below offers no clue as to how it was able to divine what is in the minds of board members and citizens. It doesn't state whether its determination applies to all citizens or some citizens, to all board members or some board members. This speculative determination is the crux of the Court's decision. Only by assuming the Board to be two-tiered is the Court able to support its selection of the unmodified *Abate* methodology and the resultant malapportionment percentage.

It is well settled that the function of a court of appeals as well as a trial court on a motion for summary judgment is merely to determine whether triable issues of material facts exist, not to try such issues, *Empire Electronics Co. v. United States,* 311 F.2d 175, 179 (2d Cir. 1975), *Continental Casualty Co. v. City of Richmond,* 708 F. 2d 1483, 1487 (9th Cir. 1985); particularly where the facts are gleaned only from affidavits, *Jaroslawicz v. Seedman,* 528 F. 2d 727, 731 (2d Cir. 1975); and involve questions of intent or a subjective state of mind. *Washington Post Co. v. Keogh,* 365 F. 2d 965, 967, *aff'd* 125 U.S. App. D.C. 32, *cert. denied* 385 U.S. 1011, see *Friedman v. Meyers,* 482 F. 2d 435, 438-39 (2d Cir. 1973). Moreover, where the Court is confronted with a choice of inferences to be drawn from underlying facts in affidavits and exhibits, the inferences "must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962). The Court of Appeals erred in trying a factual issue raised *sua sponte* with "facts" the Court itself invented notwithstanding the presence in the record of affidavits contradicting the Court's inferred "facts."

THE DECISION OF THE COURT OF APPEALS CONTRADICTS PRIOR DECISIONS OF THE SUPREME COURT, THE COURT OF APPEALS, AND THE NEW YORK COURT OF APPEALS.

Two decades after the promulgation of the one-person, one-vote principle, there remains considerable uncertainty over what it means. Grofman and Scarrow, "The Riddle of Apportionment: Equality of What?," National Civic Review, 242 (1981). The decisions of the Courts below simply add to the confusion. Upon the first appeal of this action, Intervenor Ponterio argued that reapportionment of the Board in conformity with ordinary representational standards would effectively disenfranchise the borough of Staten Island. The Court responded: "the fact that a minority may regularly be overshadowed by its more populous neighbors under a proportional voting scheme is one characteristic of a representative democracy." (A204).

On the other hand, to avoid just such a result for county boards of supervisors throughout New York State (which, like the Board of Estimate, are bodies of local government composed of *ex officio* members, and which function only by voting), the state courts sanctioned an entirely different concept of vote apportionment, viz., district voting power.[1,2] *Franklin v. Krause*, 32 N.Y.2d

1. The objective of district voting power apportionment is to give each constituent town a mathematical probability of affecting board vote outcomes proportional to its relative population. For example, if town A has 10% of the total county population, its representative should have 10% of all decisive votes. "Decisive" means that if a town's vote is changed, the vote outcome of the board (e.g., achievement of a majority) is changed. By contrast, ordinary representational apportionment would allocate 10% of the number of representatives (or votes) to town A, without regard to the resulting ability of towns to affect vote outcomes.

234 (1973), *appeal dismissed* 415 U.S. 904 (1974), *Iannucci v. Board of Supervisors*, 20 N.Y.2d 244 (1967). Of New York's 57 counties outside New York City, 24 have been so apportioned. Grofman & Scarrow, "Weighted Voting in New York," iv Legis L.Q. 287, 288 (May 1981).

By dismissing the appeal in *Franklin* for want of a substantial federal question, the Supreme Court has implicitly approved district voting power apportionment. The Second Circuit Court of Appeals has approved it explicitly. *League of Women Voters v. Board of Supervisors of Nassau County*, 737 F.2d 155 (2d Cir. 1984), *Greenwald v. Board of Supervisors*, 567 F.Supp. 200 (S.D.N.Y.), *aff'd without opinion*, 742 F.2d 1434 (2d Cir. 1983).

For single-member districts, ordinary representational standards require essentially equal district populations. *Reynolds v. Sims*, 377 U.S. 533 (1964), *Avery v. Midland County*, 390 U.S. 474 (1968). For multi-member districts, those standards require essentially equal population-per-representative ratios. *Abate v. Mundt*, 403 U.S. 182 (1971), *Whitcomb v. Chavis*, 403 U.S. 124 (1971). In neither case is there any regard to the effect such apportionment has on the opportunity for any district to affect outcomes of a vote by the governmental body. District voting power apportionment and representational apportionment have completely different objectives. Indeed, in voting power apportionments, smaller districts must be given a far greater number of representatives or

2. This concept commonly referred to as weighted voting since it is usually implemented using weighted votes rather than multiple members to preserve the effectiveness derived from the small size of such boards. Nevertheless, the operative feature of this concept is that it equalizes district voting power, not representation. Use of weighted votes is incidental.

votes than would be determined by ordinary representational standards. For example, in the Nassau County case examined in *League*, the smallest town, Glen Cove, was allotted three times the number of votes justified by equalization of population-per-vote ratios.[3] The maximum deviation of the board approved in *League* is 5.26% if analyzed in terms of voting power but is 85.58% if analyzed by the *Abate* (population-per-vote ratio) method. Corresponding deviations for the Board of Estimate are 11.55% and 77.95%.

Following plaintiffs' admission that district voting power apportionment is an acceptable method for applying constitutional one-person, one-vote principles to the Board of Estimate, intervenor Ponterio presented appropriate computations to the District Court, and subsequently to the Court of Appeals, that account for the presence of the three at-large members as well as the five borough members. Neither court commented on these computations in its decision. Nor did either court reconcile its disapproval of Board apportionment with the Second Circuit's approval of the Nassau County Board in *League* whose malapportionment by *Abate* standards exceeds that of the Board of Estimate. The city defendants presented no methodology argument in the District Court. On the second appeal they suggested a different voting power method, viz., citizen voting power (also termed the "Banzhaf index"). Citizen voting power purports to measure the power of a citizen to affect board vote outcomes, acting through his representative. It is calculated by

3. Glen Cove had a population of 24,618 or 1.86% of the total county population of 1,321,582. By *Abate* standards, it should have been allocated 1.8% of the total of 108 board votes (i.e., 2 votes). Instead it was allocated 6 votes so that its voting power would be commensurate with its population.

multiplying his district's voting power by his power to elect board representatives. The first component is identical to district voting power described above. Intervenor Ponterio does not favor this method because its second component relies upon many unrealistic assumptions and an essential ingredient has been rejected by the Supreme Court. *Whitcomb*, 403 U.S. at 145-46.

The Court of Appeals also rejected the citizen voting power method. However, in doing so, it contradicted its own acceptance of the *district* voting power method in *League* and *Greenwald*, as well as the Supreme Court's acceptance of that method in *Franklin*. The Court finds "seriously defective" the method's assumptions of the "same weight . . . and same probability of occurrence for each of the 552 possible voting combinations in which a single Board member can determine outcome" (A27).[4] This very premise underlies the district voting power analysis approved in *Franklin*, *League*, and *Greenwald*. *League*, 737 F. 2d at 168-69. It is not clear whether the Court understood that, in rejecting this component of the *citizen* voting power method, it was also rejecting the *district* voting power method altogether. The Court may have been misled by the city defendants' brief in which the two methods were confused and inaccurately described.

4. Among other things, the Court confuses voting combinations with decisive votes. Obviously, for an 8-member board, there are 2^8 or 256 possible voting combinations. In 168 of them (for a simple majority of 6 votes out of 11 votes) one or more members holds a decisive vote. The total number of decisive votes for all members in all these 168 combinations is 552. It should be noted that the method does not require an assumption of equal probability of occurrence of all voting combinations. Any distribution of probabilities can be incorporated in the analysis. In the absence of known, actual probabilities, the best estimate from an analysis perspective is that the probabilities are equal.

The Court of Appeals continues its contradiction of prior decisions by stating that "voter power over outcome is irrelevant to equal protection analysis" (A44) and that the equal protection clause protects "the equalization of voter representation, not interest representation" (A34). Obviously, both *Franklin* and *League* acknowledge the protection of interests (i.e., of towns, not of citizens) by equalizing the voting power that towns have over board vote outcomes.

THE DECISION OF THE COURT OF APPEALS TO ELIMINATE AT-LARGE MEMBERS FROM THE ANALYSIS WAS ARBITRARY AND WILL UNDERMINE THE IMPLEMENTATION OF INNOVATIVE FORMS OF LOCAL GOVERNMENT.

The Board of Estimate is the most powerful local governmental body of the most important city in the nation. Its composition and voting procedures are unique. Together with the City Council, it comprises the country's only bicameral municipal government. It is the paramount example of the kind of innovation the Supreme Court has recognized as essential.

> "[v]iable local governments may need many innovations, numerous combinations of old and new devices, [and] great flexibility in municipal arrangements to meet changing urban conditions," *Sailors v. Board of Education*, 387 U.S. 105, 110-11 (1967). "The Constitution does not require that a uniform straitjacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems." *Avery v. Midland County*, 390 U.S. 474, 485 (1968).

Innovative forms of government also need innovative scrutiny to assess their compliance with one-person, one-vote principles. The response of the courts below has been to strip the Board of all its salient features until a residue is left that can be analyzed by *Abate* methodology. If square pegs are repeatedly forced into round holes, sooner or later all pegs will be round.

The Court below cited two reasons for adopting the unmodified *Abate* method. First, it agreed with the District Court that the method has been used to analyze malapportionment in other cases involving a combination of at-large and local representatives. Second, it concluded, on the basis of pure conjecture as to factual matters, that the Board is two tiered; one tier composed of 3 at-large members and a second tier composed of 5 local members, and that each tier must be analyzed separately.

In none of the cases relied upon by the courts below was analysis methodology in issue and in none of those cases would the conclusion have been materially affected by inclusion of at-large members in the analysis. Particularly noteworthy is the courts' reliance on *Avery*. Not only was there no issue raised therein as to choice of methodology, there was no analysis whatever. The sole issue was whether a unit of local government is subject to the one-person, one-vote principle in the first instance. The defendants in *Avery* made no claim that their apportionment plan met any constitutional test. In fact, they testified that population was not an apportionment criterion. Moreover, the courts below ignored altogether those cases in which at-large (floterial) members *were* included in apportionment analyses. *Davis v. Mann*, 377 U.S. 678 (1964); *Kilgarlin v. Hill*, 386 U.S. 120 (1967); *Mahan v. Howell*, 410 U.S. 315 (1972); *Kilgarlin v. Martin*, 252 F.Supp. 404 (S.D. Texas 1966); *Cosner v. Dalton*, 572 F.Supp. 350 (E.D. Va. 1981); *Boyer v. Gardner*, 540 F.Supp.624 (D.N.H. 1982), and those Courts' own deci-

sions, *Andrews v. Koch*, 528 F.Supp. 246 (E.D.N.Y. 1981) *summ. aff'd* 688 F.2d 815 (2d Cir. 1982), *aff'd sub nom. Giacobbe v. Andrews*, 459 U.S. 801 (1982).

There can be little doubt that the courts below hypothesized a two-tiered Board simply to avoid the slightly more complex task of assessing the Board as it undeniably exists—an inseparable 8-member body (A183 at n.16). The courts below had a golden opportunity to make a significant contribution toward a clarification of unsettled issues in apportionment law. They failed to assume that burden.

It is earnestly hoped that the Supreme Court will seize the opportunity. Mathematical uncertainty has been repeatedly used as the favorite excuse for not grappling with innovative apportionment plans. We were initially led to expect otherwise:

> "We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath of office requires no less of us." *Reynolds*, 377 U.S. at 566.

Nevertheless, this court backed away from that pledge 9 years later in its famous footnote, "We decline to enter this imbroglio of mathematical manipulation," *Mahan v. Howell*, 410 U.S. 315, 319, n. 6. In truth, the imbroglio in *Mahan* had nothing to do with mathematical manipulation. The note referred to a dispute as to whether floterial districts should be analyzed by the aggregate or shared-floater methods. The choice of method involves political science not mathematics. For example, the aggregate method might be appropriate where constituent districts have common interests or needs and the at-large (floater) representative represents his constituents as a

unitary group without regard to their district of residence. The shared-floater method might be appropriate where constituent districts have diverse or conflicting interests, as where they have been combined for numerical convenience only. In such a case, an at-large representative may balance his representation in proportion to each district's population. Once a method is selected, there is no dispute whatever over the appropriate mathematical calculation. In short, the only factor not involved in the "imbroglio" is the "mathematical manipulation."

The Court's desire to restrict apportionment mathematics to sixth-grade arithmetic is no excuse for demolishing the Board of Estimate. District voting power is a court-approved basis for Board apportionment that accounts for every salient feature of the Board's composition and voting rules. It employs nothing more complex than high-school algebra. No computers or computer experts are required. The computations involve nothing more than paper, pencil, and the knowledge of a reasonably bright high-school junior. The entire computation applicable to a simple majority vote of the full Board is given in Exhibit A. The resulting malapportionment is within constitutionally acceptable bounds.

THE BOARD OF ESTIMATE PROVIDES A CONSTITUTIONALLY ACCEPTABLE INSTRUMENT OF LOCAL GOVERNMENT

On remand to the District Court after the first appeal of this action, the Second Circuit indicated the kind of analysis that should be made. "Whether the present allocation of seats on the Board is a constitutionally permissible way of blending majority control with minority representation and other legitimate needs of local government is one issue to be examined on remand." (A204). The

Board, as it exists and as it operates, meets this test. Plaintiffs-appellees concede that equalization of district voting power is an acceptable means to implement one-person, one-vote principles on the Board. In fact, plaintiffs-appellees suggested an alternative plan of district voting power apportionment.

Intervenor Ponterio agrees that the voting power apportionment on the Board could be made more mathematically perfect. It is submitted, however, that the question of whether the Board configuration must be altered does not arise at all unless a determination is first made that the existing configuration is constitutionally unacceptable. There is no dispute that actual voting power on the Board is as shown in the "Vote Power" columns of Tables 1 and 2. There is no dispute that if Board voting power were apportioned with mathematical perfection according to borough populations, voting power would be as shown in the columns headed "Norm Vote Power." The malapportionment issue boils down to this: must a venerable, admittedly effective body of local government be completely revamped or discarded for the sole purpose of shifting 5 or 6% voting power from Staten Island to Brooklyn? We submit that the answer is no.

The overlay of at-large and local votes ensures that no enabling vote of the Board can occur without the vote of at least one or a combination of members representing the entire city. Clearly, there is majority control of the Board. On the full Board, the at-large members hold a majority of votes (6 out of 11) and a majority of voting power (56.52%). On the mayorless Board, the five borough presidents hold a majority of votes (5 out of 9) and voting power (53.85%). Nevertheless, majority control is still assured as it is still true that an enabling vote cannot occur without the vote of at least one or a combination of

TABLE 1

VOTING POWER ANALYSIS
BOARD OF ESTIMATE (FULL BOARD)

		SIMPLE MAJORITY			2/3 MAJORITY			3/4 MAJORITY		
MEMBER	NO. OF VOTES	NORM VOTE POWER	VOTE POWER	% DEVIATION	NORM VOTE POWER	VOTE POWER	% DEVIATION	NORM VOTE POWER	VOTE POWER	% DEVIATION
BROOKLYN	1	13.72	8.70	-5.02	14.34	9.09	-5.25	14.80	9.38	-5.42
QUEENS	1	11.63	8.70	-2.93	12.16	9.09	-3.07	12.55	9.38	-3.17
MANHATTAN	1	8.78	8.70	-0.08	9.18	9.09	-0.09	9.47	9.38	-0.09
BRONX	1	7.19	8.70	+1.51	7.51	9.09	+1.58	7.75	9.38	+1.63
STATEN IS.	1	2.17	8.70	+6.53	2.26	9.09	+6.83	2.34	9.38	+7.04
MAYOR	2	18.84	18.84	0	18.18	18.18	0	17.70	17.70	0
COMPTROLLER	2	18.84	18.84	0	18.18	18.18	0	17.70	17.70	0
COUNCIL PRES.	2	18.84	18.84	0	18.18	18.18	0	17.70	17.70	0
MAXIMUM DEVIATION:				11.55%			12.08%			12.46%

TABLE 2

VOTING POWER ANALYSIS
BOARD OF ESTIMATE (MAYORLESS BOARD)

		SIMPLE MAJORITY			2/3 MAJORITY		
MEMBER	NO. OF VOTES	NORM VOTE POWER	VOTE POWER	% DEVIATION	NORM VOTE POWER	VOTE POWER	% DEVIATION
BROOKLYN	1	16.99	10.77	-6.22	16.90	10.71	-6.19
QUEENS	1	14.40	10.77	-3.63	14.32	10.71	-3.61
MANHATTAN	1	10.87	10.77	-0.10	10.81	10.71	-0.10
BRONX	1	8.90	10.77	+1.87	8.85	10.71	+1.86
STATEN IS.	1	2.68	10.77	+8.09	2.67	10.71	+8.04
COMPTROLLER	2	23.08	23.08	0	23.21	23.21	0
COUNCIL PRES.	2	23.08	23.08	0	23.21	23.21	0
MAXIMUM DEVIATION:				14.31%			14.23%

members representing the entire city. In the case where a 5-vote majority is achieved by the votes of the borough presidents alone, it has been argued that this gives Staten Island an undeserved veto power. What seems to have been overlooked is that even if the five borough votes were allocated on a strict population-per-vote basis (Brooklyn 1.58, Queens 1.34, Manhattan 1.01, Bronx 0.83, Staten Island 0.25) the result would be unchanged. Staten Island's 0.25 vote would be just as necessary in achieving the 5-vote total as its 1 vote under the current vote allocation. This illustration points up the danger of focussing on only one of many possibilities. It is the strength of the district voting power method that it accounts for all possibilities.[5]

The New York county board cases make clear that, except where gerrymandering is the issue, equal protection does not translate into equal opportunity of citizens to elect representatives but rather equal opportunity of representatives to act. Ordinarily in single-member, equal-population district plans, one need not confront this issue since satisfying the former requirement automatically satisfies the latter. However, suppose the New York State Assembly were modified giving two votes instead of one to members from districts south of Yonkers. It is unlikely any court would uphold such a plan even though there would be no dilution of any citizen's power to elect his representative. Conversely, if Brooklyn's borough president were allocated six times as many votes as Staten Island's (Brooklyn has six times the population of Staten island), the citizens of Brooklyn could not complain even though the alleged dilution of their power to elect a representative would remain unchanged.

5. The Mayor does not participate in votes to override a mayoral budget veto. There are then 2' or 128 possible vote outcomes. Either the Board or the City Council may initiate a veto override. Override requires a ⅔ majority of the initiating body plus simple majority vote of the other body. Therefore, a 5-vote board majority is effective only when there has already been a ⅔ majority vote in the Council.

Providing equal protection on full-fledged representational bodies that have multi-member, floterial, or mixed representational plans may raise difficult political science issues. Not so with the Board of Estimate. It functions only by voting. The obvious measure of equal protection is borough voting power. The analysis method urged by Appellant Ponterio measures just that, and shows that the Board provides an acceptable blend of majority control and borough participation.

CONCLUSION

For the reasons stated herein, this Court should note probable jurisdiction of this appeal and grant plenary review.

December 29, 1987

Respectfully submitted,

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EXHIBIT A

District Voting Power Calculation
(for 6-vote majority of the full Board)
Note: The following member designations are used:
CW—a city-wide Board member (2 votes)
BP—a borough president (1 vote)

Decisive votes occur only in vote totals of 4, 5, 6, and 7. Borough Presidents have decisive votes only in vote totals of 5 and 6. City-wide members' votes are decisive in vote totals of 4, 5, 6, and 7.*

The number of distinct groups of r members that can be formed from a total population of n members is equal to: $\frac{n!}{r!(n-r)!}$. For each possible group size, the corresponding values are:

City-wide Members		*Borough Presidents*	
Group Size	*# of Groups*	*Group Size*	*# of Groups*
0	1	0	1
1	3	1	5
2	3	2	10
3	1	3	10
		4	5
		5	1

*To illustrate: If the "yes" vote total is 4, those city-wide members not voting "yes" hold decisive votes since any one of them can change the outcome by switching his 2 votes to "yes." A borough president could not change the outcome by switching his 1 vote. If the "yes" vote total is 6, all members voting "yes" hold decisive votes since any one of them can change the outcome by switching his 1 or 2 votes to "no."

The number of distinct groups of combinations of city-wide members and borough presidents is equal to the product of the number of groups of city-wide members and the number of groups of borough presidents. For example, for a combination of 1 city-wide member and 3 borough presidents, there are 3x10 or 30 distinct groups of the combination. The computation of decisive votes and resulting voting powers is shown in Table A-1, which follows.

TABLE A-1

Vote Total	Voting Combinations	No. of Combination Groups	No. of CW Members with Decisive Votes	No. of BPs with Decisive Votes	Total of CW Decisive Votes	Total of BP Decisive Votes	Total of all Decisive Votes
4	2CW+0BP	3x1=3	1	0	3	0	3
4	1CW+2BP	3x10=30	2	0	60	0	60
4	0CW+4BP	1X5=5	3	0	15	0	15
5	2CW+1BP	3X5=15	1	4	15	60	75
5	1CW+3BP	3X10=30	2	2	60	60	120
5	0CW+5BP	1X1=1	3	0	3	0	3
6	3CW+0BP	1X1=1	3	0	3	0	3
6	2CW+2BP	3X10=30	2	2	60	60	120
6	1CW+4BP	3X5=15	1	4	15	60	75
7	3CW+1BP	1X5=5	3	0	15	0	15
7	2CW+3BP	3X10=30	2	0	60	0	60
7	1CW+5BP	3X1=3	1	0	3	0	3
	Totals:	168			312	240	552

Aggregate voting power of CW members $= \frac{312}{552} = 56.52\%$;
Voting power of each CW member = $56.52\% \div 3 = 18.84\%$

Aggregate voting power of borough presidents $= \frac{240}{552} = 43.48\%$
Voting power of each borough president = $43.48\% \div 5 = 8.70\%$

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No. _____

Supreme Court of the United States
OCTOBER TERM, 1987

FRANK V. PONTERIO,

Appellant,

v.

BEVERLY MORRIS, JOY CLARKE HOLMES, and JOANNE OPLUSTIL,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPELLANT'S APPENDIX
(Volume I—Pages 1-118)

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EDITOR'S NOTE

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BEVERLY MORRIS, JOY CLARKE HOLMES, JOANNE OPLUSTIL,

Plaintiffs-Appellees,

v.

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, Individually and as Mayor of the City of New York, ANDREW STEIN, Individually and as City Council President, HARRISON J. GOLDIN, Individually and as Comptroller for the City of New York, HOWARD GOLDEN, DAVID N. DINKINS, FERNANDO FERRER, CLARE SHULMAN, RALPH J. LAMBERTI, each Individually and as Borough Presidents of the Boroughs of the City of New York,

Defendants-Appellants,

-and-

FRANK V. PONTERIO,

Intervenor-Defendant-Appellant,

ROBERT A. STRANIERE, Individually and as a member of the New York State Assembly,

Intervenor-Defendant-Appellant.

Court of Appeals
Docket Nos. 86-9019, 9041 and 9059

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that

Frank V. Ponterio, an intervenor-

defendant-appellant above-named does hereby appeal to the Supreme Court of the United States from the judgment of the United States Court of Appeals for the Second Circuit, entered October 8, 1987 which affirmed the judgment of the United States District Court for the Eastern District of New York entered November 19, 1986 holding that sections 61 and 62 of the New York City Charter violate the equal protection clause of the Fourteenth Amendment to the United States Constitution.

This appeal is taken pursuant to 28 USC Sect. 1254(2).

Dated: Staten Island, New York
December 15, 1987

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DECISION OF THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DATED OCTOBER 8, 1987
DOCKET NOS. 86-9019, 9041, 9059

BEVERLY MORRIS, JOY CLARKE HOLMES, JOANNE OPLUSTIL,

Plaintiffs-Appellees,

v.

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, Individually and as Mayor of the City of New York, ANDREW STEIN, Individually and as City Council President, HARRISON J. GOLDIN, Individually and as Comptroller for the City of New York, HOWARD GOLDEN, DAVID N. DINKINS, FERNANDO FERRER, CLARE SHULMAN, RALPH J. LAMBERTI, each individually and as Borough Presidents of the Boroughs of the City of New York,

Defendants-Appellants,

-and-

FRANK V. PONTERIO,

Intervenor-Defendant-Appellant,

ROBERT A. STRANIERE, Individually and as a member of the New York State Assembly,

Intervenor-Defendant-Appellant.

Before OAKES, NEWMAN, and PIERCE, Circuit Judges.

Appeal by the New York City Board of Estimate and individual members thereof, as well as two intervenors, from a decision of the United States District Court for the

Eastern District of New York, Edward R. Neaher, Judge, on remand, holding that the fact that three members of the Board were elected citywide did not affect the 132.9% unconstitutional deviation under Abate v. Mundt existing between largest and smallest boroughs. Morris v. Board of Estimate, 592 F. Supp. 1462 (E.D.N.Y. 1984). Affirmed.

Newman, Circuit Judge, filed a concurring opinion.

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Robert A. Straniere, Staten Island, NY, Appellant Pro Se.

Richard Emery, New York Civil Liberties Union, New York, NY (Arthur Eisenberg, New York Civil Liberties Union, of counsel), for Appellees.
John J. Marchi, Amicus Curiae Pro Se.

Michael Weinberger, New York, NY for Amicus Curiae Staten Island League for Better Government.

OAKES, Circuit Judge:

The Board of Estimate is a body of New York City municipal government authorized by chapter 3 of the New York city charter. It is comprised of the mayor, city council president, comptroller, and the five borough presidents of the City of New York, which is to a substantial extent governed by the Board of Estimate. The three citywide officials on the Board are granted two votes each as to non-budgetary matters, while each borough president is granted one vote. As to budget matters, the mayor has no vote but does have a veto power. The Board of Estimate is the only municipal body in New York City government which requires the

mayor, the comptroller, the city council president, and the borough presidents to meet regularly and vote together upon issues concerning the governing of New York City. It exclusively determines the use, development, and improvement of city property; approves the standards, magnitude, and final design of capital projects; negotiates and enters into all contracts on behalf of the city; negotiates and approves all franchises granted by the city; grants leases of city property and enters into leases of property for city use; sets water rates and sewer rates in the city; approves or modifies all zoning decisions; and sets tax abatements. The Board's enormous exclusive powers may be illustrated by saying that it alone may determine whether and where a toxic waste dump can be located in the city, as we explore later in this opinion.

Besides the Board's exclusive powers, it has powers acting in conjunction with the New York City Council to recommend and approve the expense budget and the capital budget of the city (without the participation of the mayor), periodically to modify the budgets of the city, to override mayoral vetos of budget items, and to hold hearings on budgetary matters. The Board of Estimate also administers the Bureaus of Franchises and of the Secretary, holds public hearings on matters of city policy when called upon to do so by the mayor or in its discretion for the public interest, holds hearings on tax abatements, and makes recommendations to the mayor or City Council in regard to any matter of city policy. The parties stipulated that the population of the City of New York is 7,071,030, and that the population of Brooklyn is 2,230,936, Queens 1,891,325,

Manhattan 1,427,533, the Bronx, 1,169,115, and Staten Island, 352,121.

Having determined that the Board of Estimate is subject to the "one-person, one-vote" principle, we remanded this case when it first came before us with instructions that the district court begin its task by deciding on an appropriate methodology for determining the degree of malapportionment present. Morris v. Board of Estimate, 707 F.2d 686, 690-91 (2d Cir. 1983). In a footnote our opinion noted, "For example, the fact that three members of the Board are elected at large from the entire city raises novel issues as to how an individual voter's opportunity to elect these members should be assessed in conjunction with his opportunity to elect his borough representative." Id. at 690 n.3. The district court, following the principle articulated in Abate v. Mundt, 403 U.S. 182,

185 (1971), that "electoral apportionment must be based on the general principle of population equality and [that] this [principle] applies to ... local elections," Morris v. Board of Estimate, 592 F. Supp. 1462, 1466 (E.D.N.Y. 1984), determined the maximum deviation from equality, or "overall range,"[1] by taking the sum of the deviation from ideal district population of the most and least populous boroughs. The court refused to modify the Abate methodology by virtue of the presence on the Board of three officials elected at-large, and focused only on the five borough presidents. Measuring from an ideal district population of 1,414,206, the court calculated the deviation from equality thus:

Borough	Population	Deviation
Brooklyn	2,230,936	- 57.7%
Queens	1,891,325	- 33.7%
Manhattan	1,427,533	- 0.9%
Bronx	1,169,115	+ 17.4%
Staten Island	352,121	+ 75.2%

Adding the 57.7% deviation of Brooklyn as the most underrepresented borough to the 75.2% deviation of Staten Island as the most overrepresented borough, the court arrived at a maximum deviation or range of 132.9% Id. at 1475.

We commence by noting that the district court did not violate what we read as the mandate of this court in declining to consider citywide board members in determining the constitutionality of the present Board. In the first place, what we said earlier was simply that the district court should address the question whether the presence of the three members of the Board who are elected at large from the entire city should make a difference in

respect to methodology. The district court did address that question at considerable length and answered it in the negative. The court did so for three reasons which, though briefly summarized here, will be more fully discussed below. The district court argued convenience, mentioning the "demonstrated impatience with mathematical metaphysics" in Mahan v. Howell, 410 U.S. 315, 319, n.6, modified on reh'g, 411 U.S. 922 (1973); principle, in that that at-large members represent voters as city residents, giving every voter an equal say in their election, while the borough presidents represent voters in their capacities as residents of a particular borough; and precedent. See 592 F. Supp. at 1466, 1470-75. We turn then to the issues argued on this appeal.

Though two issues concerning the district court's methodology are closely related, for the sake of clarity we will

distinguish them. The first and more basic issue is whether the court correctly adopted the Abate test, which looks only to the relative power of voters to elect representatives, and therefore focuses almost entirely on the simple question of population per representative. The Board strenuously urges that the court should instead have applied the Banzhaf index, to measure the power of voters in the various boroughs to affect the outcome of a Board vote.[2] The second issue is whether the court should have included the at-large representatives on the Board in any calculation of voting inequality. Use of the Banzhaf index would require inclusion of the at-large representatives, since the outcome of a Board vote will often turn on how one of the at-large members casts his vote.[3] Using the Abate method, however, leaves whether to modify the test so as to include the at-large

representatives in calculations of voter inequality as a distinct issue.

Turning first to the more basic of the methodological issues raised here, we hold that the district court properly adopted the Abate theory that what the equal protection clause requires be equalized among voters is their "share" of representatives on the governmental body in question. In the simplest of cases, where each representative has an equal vote (i.e., there is no weighted voting), Abate requires only that the court look to the number of citizens in each representative's district; equality is achieved where those numbers are equal.

The Abate, analysis, with its focus on a citizen's power to elect representatives, has its provenance in Reynolds v. Sims, 377 U.S. 533 (1964), which of course concerned a state legislature. There, after noting that "[m]ost citizens can achieve ... [[f]ull and

effective participation ... in state government] only through the election of legislators to represent them," id. at 565, the Court held that what "the Equal Protection Clause guarantees" is "the opportunity for equal participation by all voters in the election of state legislators", id. at 566, and that this required that seats in the legislature be apportioned on the basis of population, id. at 568.

This approach has been pervasive in the Supreme Court's jurisprudence of voter equality even when applied to local governmental bodies. In Avery v. Midland County, 390 U.S. 474 (1968), the Court applied the Reynolds one-person, one-vote principle to the Midland County, Texas, Commissioners Court, the county's governing board, which consisted of one member elected at large and four members elected from single-member districts of substantially

unequal population. Ignoring the presence of the member elected at large, the Court held the Midland County arrangement unconstitutional and stated "that the Constitution imposes one ground rule for the development of arrangements of local government: a requirement that units with general governmental powers over an entire geographic area not be apportioned among single-member districts of substantially unequal population." Id. at 485-86. As in Reynolds, the Court made clear precisely what the equal protection clause requires be equalized. It requires "that those qualified to vote have the right to an equally effective voice in the election process." Id. at 480 (emphasis added). See also Hadley v. Junior College District, 397 U.S. 50, 56 (1970) ("whenever a ... local government decides to select persons by popular election to perform governmental functions, ... each

qualified voter must be given an equal opportunity to participate in that election," to be achieved by establishing districts so "that equal numbers of voters can vote for proportionally equal numbers of officials") (emphasis added).

It is true that in cases involving only single member districts there is no difference between approaches seeking to equalize the power of a voter to affect the outcome of a decision and those seeking only to equalize participation in the election process.[4] Thus it an be argued that the language in Reynolds, Hadley, and Abate to the effect that it is the power of citizens to elect representatives that must be equalized is not clear authority against requiring equality of power over outcome in a case involving more complex arrangements than single-member districts. Avery nevertheless strongly suggests that the Supreme Court indeed

intends equality of electoral power to be the controlling principle in voting cases. As noted above, the governmental body in Avery consisted of four officials elected from single-member districts and one official elected at large. If the equal protection clause requires that persons have an equal ability to affect the outcome of a governing body's votes, the Court in Avery might have been expected to factor in the single at-large member, who voted when the other members' votes were tied. Such an analysis would take account of each voter's power to cast the decisive vote for the at-large member, and that member's power to cast the decisive vote when the Commissioners Court reached a decision. See note 2, supra. But, in fact, the Court did not analyze the effect on voting power of the presence of the at-large member, focusing instead entirely on the population disparity among

the districts electing the other four members. A court that looks only to voters' relative power to elect representatives for single-member districts, where the scheme also includes at-large members, is obviously not thinking of equality in terms of power over the outcome of voters in the governing body. See also Markoe v. Legislature of Virgin Islands, 592 F.2d 188, 190-91 (3d Cir. 1979) (determining equality of representation in electing a fifteen-member body without reference to the one at-large representative); Perry v. City of Opelousas, 515 F.2d 639, 641-42 (5th Cir. 1975) (maximum deviation in case involving five single-member and one at-large district calculated solely by reference to the single-member districts); Latino Political Action Committee, Inc. v. City of Boston, 568 F. Supp. 1012, 1015 (D. Mass.), stay denied, 716 F.2d 68 (1st Cir.), stay denied,

463 U.S. 1319 (1983) (Brennan, J., in chambers) (nine district and four at-large members; maximum deviation calculated by reference only to the nine district members); Martin v. Venables, 401 F. Supp. 611 (D. Conn. 1975) (Newman, J.) (town council of ten single-member and one at-large districts; no reference to at-large member). The clear lesson of Avery and the other cases cited is that the proper inquiry in cases such as this is into the relative power of voters to elect representatives.[5]

We find further support for our conclusion in the Supreme Court's decision in Whitcomb v. Chavis, 403 U.S. 124 (1971). In that case a citizen of Lake County, Indiana, challenged the state's arrangement of multimember electoral districts for the state general assembly, claiming that "Marion County was one-third larger in population and ... had approximately one-third more

assembly seats than Lake County, but that voter influence does not vary inversely with population and that permitting Marion County voters to elect 23 assemblymen at large gave them a disproportionate advantage over voters in Lake County." Id. at 129 (footnote omitted). The citizen-plaintiff claimed that "Marion County voters had greater opportunity to cast tiebreaking or 'critical' votes." Id. at 137. Other plaintiffs argued that multimember Indiana districts gave disproportionate advantage to voters in those districts over voters in single-member Indiana districts, on the ground that the voter represented by multiple representatives had a disproportionate opportunity to influence the outcome of votes in the general assembly. Id. at 144. These, of course, are claims based on the Banzhaf voting-power method of measuring voter equality. See id. at

145-46. n.23. The Court stated that it had no quarrel with the plaintiffs' mathematical demonstration "that in theory voting power does not vary inversely with the size of the district and that to increase legislative seats in proportion to increased population gives undue voting power to the voter in the multi-member district since he has more chances to determine election outcomes than does the voter in the single member district." Id. at 144-45. Nevertheless, the Court refused to adopt the Banzhaf analysis, because "the position remains a theoretical one," id. at 145, and was unrealistic in not taking into account "any political or other factors which might affect the actual voting power of the residents, which might include party affiliation, race, previous voting characteristics or any other factors which go into the entire political voting situation." Id. at 146.

We are similarly persuaded that the Banzhaf index is an insufficiently realistic measure of voter equality to provide the basis of a Fourteenth Amendment analysis of voter equality. It is unrealistic in a general sense involving voter motivation; and it is unrealistic in a particular sense as it applies to citizen voting power through the Board of Estimate. As a result, the Banzhaf index does not sufficiently reflect " "t]he real life impact of [the makeup of the Board of Estimate and the way its members are elected] on individual voting power ... to warrant departure from prior cases." Id.

As a general matter, a core claim of the Banzhaf analysis, that the ability of a voter to cast a decisive vote in an election is the proper test of voting power, is unrealistic. As one commentator has written,

> [u]ndoubtedly, the chance to break a tie is not a significant voting motivation. In terms of utility theory, a voter would sell

> that right for very little, whereas he would charge much more to give up his right to vote altogether. The chance to break a tie thus constitutes only a small part of the value of voting, and it is not clear that this chance fairly represents the comparative value of voting in [different] districts.

Mr. Finkelstein, Quantitative Methods in Law 112 (1978). See also Rae, Reapportionment and Political Democracy, in Reapportionment in the 1970's, at 95, 95 (N. Polsby ed. 1971) ("the most rigorous analysis of the value assignable to a single vote leads its authors to emphasize considerations having nothing to do with outcomes ... One votes because he thinks it his duty as a citizen or because he feels social pressure to do so or because he finds a symbol of inclusion in the act. All this is independent of the political consequences of voting ...." (emphasis in original; foootnote omitted)), citing Riker and Ordeshook, A Theory of the Calculus of Voting, 62 Am. Pol. Sci. Rev. 25 (1968).

Even assuming that a desired outcome is a significant motivating factor for voters, the Banzhafian calculation of the probability of voter decisiveness in the outcome of an election is unrealistic, for the reasons noted in Whitcomb v. Chavis, supra. That calculation assumes "that all combinations of voters are equally likely," an assumption which "is not particularly sensible in a context where partisanship, race, or other characteristics impinge on voter choice and are related to voters' expected policy benefits from particular election outcomes." Grofman, Fair and Equal Representation, 91 Ethics 477, 479-80 (1981) (footnote omitted). See also Grofman and Scarrow, The Riddle of Apportionment: Equality of What, 70 Nat'l Civic Rev. 242, 245-46 (1981) (Banzhaf model ignores ingrained partisan preferences, as well as voting habits, that have an impact on election outcome).

It is not only at the level of voter decisiveness in election outcomes that we detect a lack of realism. The Banzhaf analysis is seriously defective in the way it measures Board members' power to determine the outcome of a Board vote. The problem is that it gives the same weight to and assumes the same probability of occurrence for each of the 552 possible voting combinations in which a single Board member can determine outcome. See note 2, supra. This assumption ignores, however, "the deference that the Board traditionally pays to the views of borough presidents on matters affecting their boroughs in particular ways." Brief for Board of Estimate at 35. This tradition of "collegiality" means that a borough president often if not usually controls the votes of all five borough presidents on issues of local importance. It follows that, because the Mayor cannot vote

on certain budget items, a borough president with a special interest in the item can in effect control that item by himself. Even on non-budget matters, borough president collegiality results in all five borough presidents voting together on many issues.[6] As the amicus curiae Citizens Union of the City of New York points out, this means that the "552 equally possible voting combinations" assumed by Banzhafian analysis are purely theoretical.[7]

As the Board itself argues in its brief, "any mathematical device to measure discrimination in voting must bear a resemblance to the way the process really works." The Banzhaf index urged upon us by the Board makes unrealistic assumptions as applied in this case and accordingly does not pass that test. We recognize, of course, that the equal protection analysis of voter equality that the cases establish and that we

follow here -- the requirement that voters have an equal opportunity to elect representatives -- is not itself flawless, and certainly that the "equally populated districts" method of achieving such equality is likewise imperfect because it too must make assumptions that do not always mirror reality. See Grofman, Fair and Equal Representation, 91 Ethics 477, 480 n.8. Nevertheless, like the Court in Whitcomb, given the problems we have noted with Banzhafian analysis, we see insufficient reason "to depart from prior cases." And like Justice Harlan, dissenting in Whitcomb, discussing the effects of minor variations in assumptions in Banzhafian analysis, 403 U.S. at 169 n.5, we recall Mark Twain's comment that "[t]here is something fascinating about science. One gets such wholesale returns of conjecture out of such a trifling investment

of fact." Life on the Mississippi 109 (Harper & Row 1965).

We now turn to consider whether the district court should have modified the Abate test to take account of the citywide Board members in calculating voter inequality under the present system. We agree with the district court that the citywide Board members and borough presidents represent different interests, and that this divergence justifies measuring deviation from voter equality by applying the Abate test to the borough presidents alone. 592 F. Supp. at 1470-75.

We do not doubt that as members of a body that makes decisions having an effect on the entire city, the borough presidents keep in mind not only the special local interests of their constituents, but also the interests of the city as a whole. However, it is undoubtedly the case that a

representative will seek especially to advance the interests of those whose votes elect him or her. Indeed, this is a desirable state of affairs, and, as appellants and their amici urge, the very point of electing representatives from geographical areas. "[T]he very fact that representatives are severally related to distinct localities strongly implies that they have a special obligation to look after the desires and interests of the people in those localities ...." Pennock, Political Representation: An Overview, in Nomos X: Representation 12 (J. Pennock & J. Chapman eds. 1968). The apportionment cases clearly recognized the principle that an elected official "must be vigilant to serve the interests of all the people" upon whom his tenure depends. Fortson v. Dorsey, 379 U.S. 433, 438 (1965). See also Dusch v. Davis, 387 U.S. 112, 115 (1967).

Here, the Board's members primarily represent the interests of the different constituencies that elect them. The borough presidents sit on the Board of Estimate as representatives of the special concerns their constituents have qua residents of a particular borough. The citywide members, on the other hand, must be supposed to transcend such purely local interests, and to represent primarily the interests of their constituents qua residents of New York City.[8] See Affidavit of Steven Brams, quoted by the district court, 592 F. Supp. at 1474 (Jt. App. at 890). There is no fiction involved in saying, for instance, that an individual resident of Brooklyn may have distinct and potentially differing interests qua Brooklyn resident and qua New York City resident. For example, from the point of view of the city as a whole, the best place for some necessary but

locally-disruptive facility, e.g., a toxic waste dump, might be in Brooklyn, whereas from the point of view of a Brooklyn resident who lives in the neighborhood of the proposed facility the site selected may appear to be the worst possible one. It has been the function of the Board of Estimate, consisting of representatives of each interest, to judge between them and to solve the coordination problems that otherwise would arise between the boroughs. See Affidavits of Herman Badillo (Jt. App. at 422) and Werner Kramarsky (Jt. App. at 25).

Viewing the Board in this light, we hold that in calculating voter equality for equal protection purposes the citywide members should be, if not ignored, not considered in the appropriate analysis. It follows that, since the interests of Staten Island residents qua residents of that

borough have substantially identical representation on the Board to those of residents of Brooklyn, though Brooklyn is six times as populous as Staten Island, there are serious inequalities in the representation of residents of the different boroughs. Indeed, this is what the Abate test demonstrates and quantifies, a 132.9% maximum deviation from voter equality.

We wish to make it plain that we use the concept of "interest representation" in this case only in order to determine how the Board is to be analyzed for the purpose of applying the Abate test, a test that itself measures the representation of people, not of interests. Our approach is thus in accord with what has been the Supreme Court's insistence that the Equal Protection clause requires the equalization of voter representation, not interest representation. See, e.g., Reynolds v. Sims, 377 U.S. at

562 ("Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests."). On the contrary, the Board's argument, for example, that "[r]eapportionment according to exact population ... would reduce the Staten Island borough president to the status of a bystander in the Board's deliberations," Brief at 12, obviously is thinking of equal protection in terms of equal representation of interests -- here, borough interests. That view, in light of Reynolds and its progeny, is untenable. The design of the Board, which gives equal weight to each borough's interests, has devalued concomitantly the votes of individual residents of Brooklyn and Queens, and has grossly overvalued the votes of Staten Island residents. The result is exactly what the Equal Protection clause forbids: "the elevation of a small class of

'supervoters' granted an extraordinarily powerful franchise." Brown v. Thomson, 462 U.S. 835, 856 (1983) (Brennan, J., dissenting).

Having held that the district court correctly found a maximum deviation from voter equality of 132.9%, we turn next to consider whether the Board's current structure is justified by considerations of such moment that they outweigh this gross deviation from equality. We assume, for this purpose, but do not decide, that a deviation so substantial as this might in some circumstances be justifiable, given the greater flexibility accorded to local government bodies, Abate, 403 U.S. at 185, though we harbor not inconsiderable doubt as to whether this is so.

Following this court's instruction that the district court "rule on the policies and interest [sic] which the Supreme Court has

held may justify deviations form the literal one person, one vote formula," Morris v. Board of Estimate, 707 F.2d at 690, the district court directed the parties to submit a joint stipulation setting forth the agreed valid policies and interests presently served by the Board and the disputed policies and interests which at least one defendant maintains are valid and are presently served by the Board. 592 F. Supp. at 1477. The parties did so, and the district court after argument and papers issued another opinion, Morris v. Board of Estimate, 647 F. Supp. 1463 (E.D.N.Y. 1986), considering the various justifications, including the claims of no injury, uniqueness, effectuation of delegated police power responsibilities, equal Board voting power, historical practice, respect for natural boundaries, integrity of political subdivisions, effectiveness, meaningful representation of smaller

boroughs in Board affairs, and checking the mayor and supplementing the city council, i.e., promoting separation of powers. The district court recognized properly that the defendants had the burden of justification. Brown v. Thomson, 462 U.S. at 842-43; see also Mahan v. Howell, 410 U.S. 315, 328 (1973); Karcher v. Daggett, 462 U.S. 725, 740-41 (1983). Beyond weighing the assorted justifications, the district court scrutinized alternatives, pursuant to Connor v. Finch, 431 U.S. 407, 420 (1977), and Kilgarlin v. Hill, 386 U.S. 120, 123-24 (1967). See 647 F. Supp. 1475-78. The court found that alternatives "have been suggested that would 'substantially vindicate' the accepted policies and interests 'yet approximate population equality more closely,' " 647 F. Supp. at 1478 (quoting Karcher, 462 U.S. at 741). It held that the "existing plan with its much greater

departure from franchise equality does not advance the valid policies and interests." Id.

On the basis of the thorough analysis and reasoning of Judge Neaher in Morris v. Board of Estimate, 647 F. Supp. 1463, 1479, we affirm his judgment which very wisely enjoined the city defendants to undertake curative measures "with all deliberate speed." We understand that they are doing so, and when this case returns to the district court, we hope that an appropriate charter provision will be proposed accordingly. In the meantime, though flawed, the Board of Estimate may continue to function. Six months should be a target area, one year a deadline.

Judgment affirmed.

1. See Reapportionment: Law and Technology 8 (A. Wollock ed. 1980).

2. The Banzhaf index calculates an individual voter's power to affect the outcome of a Board vote, by first calculating the power of each member of the Board to affect the outcome of a Board vote, and then calculating the voter's power to cast the determining vote in the election of his representatives on the Board.

There are 552 possible voting combinations in which any one member can affect the outcome of a Board vote. Each borough president can cast the determining vote in 48 of these combinations (giving him a "voting power" of 8.7%), while each at-large member can determine outcome in 104 of 552 combinations (18.8%). Banzhaf calculates a citizen's voting power through each representative by dividing the representative's voting power by the square root of the population represented, and a citizen's total voting power by adding his power through each of his four representatives -- borough president, mayor, comptroller, and council president. Deviation from ideal voting power is then calculated by comparing this figure with that arrived at where one substitutes an electoral district of ideal population. Amicus Banzhaf sets out his calculations in the following table:

CALCULATION OF DEVIATIONS IN CITIZEN VOTING POWER IN THE PRESENT NEW YORK CITY BOARD OF ESTIMATES [sic]

A. MEMBER. AND POPULATION VOTES REPRESENTED ON BOARD	B. NUMBER OF	C. MEMBER'S VOTING POWER ON BOARD	D. CITIZEN'S VOTING POWER THRU 1 MEMBER	E. CITIZEN'S TOTAL VOTING POWER	F. PERCENT DEVIATION COLUMN E
BROOKLYN 2.230,936	1	8.7	.00582	.0271	-5.15%
QUEENS 1.891,325	1	8.7	.00632	.0276	-3.37%
MANHATTAN 1.427,533	1	8.7	.00728	.0285	-0.25%
BRONX 1.169,115	1	8.7	.00805	.0293	+2.55%
STATEN I. 352,121	1	8.7	.01467	.0359	+25.65%
MAYOR 7.071,030	2	18.84	.00709	The total of these three figures, .021256, is added [to] the figures in Column D to calculate Column E.	
COMPTROLLER 7.071,030	2	18.84	.00709		
COUN[CIL] PRES. 7.071,030	2	18.84	.00709		
AVG. DIST. 1.414,206	1	8.7	.00731	.02857	00

C. -- Numbers in Column C are calculated using the Banzhaf voting power index.

D. -- Numbers in Column D are calculated by dividing the figure in Column C by the square root of the population represented by each member, since the ability of a citizen voter to affect outcomes varies as the inverse [of] (1 divided by) the square root of the population.

E. -- Numbers in Column E are calculated by adding to the figure in Column D for each borough representative, the voting power the citizen of the borough has through the three citywide representatives [3 x .00709=.021256, excluding rounding error].

F. -- Numbers in Column F are calculated by comparing the numbers in Column E with the corresponding figures for that of one of the average districts which would be formed if the non citywide members were each elected from districts with equal population.

The Banzhaf index thus gives a maximum deviation of 30.8%.

See generally Banzhaf, One Man, ? Votes: Mathematical Analysis of Voting Power and Effective Representation, 36 Geo. Wash. L. Rev. 808 (1968).

3. Intervenor Ponterio would equate the Board to a floterial district. For the reasons stated by Judge Neaher, 592 F. Supp. at 1469-70, we reject the analogy.

4. Where only single member districts are involved "[a] specific definition of 'voting strength' is unnecessary because each citizen gets the same degree of 'representation,' regardless of the meaning of that term." Charo, Designing Mathematical Models to Describe One-Person, One-Vote Compliance by Unique Governmental Structures: The Case of the New York City Board of Estimate, 53 Fordham L. Rev. 735, 777 (1985).

5. Appellants seek to distinguish these cases on the ground that in each of them the at-large members controlled only a minority of the votes of the body, whereas here the three at-large members, with two votes each, constitute a 6-5 majority. See also Charo, supra note 4, at 776 ("[N]one of these cases have presented a situation in which at-large representatives have a majority voting bloc. This is a significant qualitative difference in the organization of the Board's voting structure" (footnote omitted)). But in the present case this distinction is inadequate. First, the exclusion in each of these cases of at-large members from an analysis of voter inequality -- when their inclusion would clearly affect the level of inequality eventually found -- can be traced most clearly perhaps to an underlying theory that holds (whatever

else it holds) that voter power over outcome is irrelevant to equal protection analysis. At the level of determining, as we must, what the precedents hold is to be equalized among voters under the Fourteenth Amendment, the distinction between a minority or majority of at-large votes might almost be called a red herring. For in the typical case there is no principled reason (nor do appellants attempt to provide one) why <u>different basic theories</u> of equal protection should apply depending on the size of the at-large membership. We find absolutely no evidence that, in the instant case, the distinction on which the appellants rely is a qualitative difference, as opposed to a difference of degree. We say that, knowing also, or at least believing along with William James, that a difference between a difference of kind and a difference of degree is itself a difference of degree.

There may, of course, be circumstances in which a different result might be required. If the at-large bloc was not simply a majority, but a majority such that it would always and necessarily control the governing body, and the district representatives play a decidedly subsidiary role, as in appellants' hypothetical of a body with the same composition as the Board, but in which the three at-large members have 100 votes each and the five single district representatives one vote each, then the precedents might easily be distinguishable and a different analysis might be called for. But that is not this case and we find it unnecessary to

speculate on the test to be applied in such a case. Though the appellant Board insists on referring to "an at-large majority voting bloc," in fact there is no such "bloc." Rather, this supposed "bloc" consists of three persons having two votes each who are free to, and do, vote on different sides of various issues. See affidavit of Herman Badillo, discussed infra note 7. Only if all three vote together are they bound to carry the day. Furthermore, on certain budget issues, on which the mayor does not vote, the at-large members cannot win a vote without the support of a borough president. It follows that there is no majority at-large voting bloc bound to control the Board and that this case is far removed from the hypotheticals offered by the Board and Amicus Banzhaf.

6. Furthermore, the borough presidents "often succeed in persuading the citywide members to observe" the practice of borough courtesy. W. Sayre & H. Kaufman, Governing New York City 638 (1960):

> The Borough Presidents bring to the Board neither the impressive formal powers of the Mayor or of the Comptroller, nor the ambiguous potential of the President of the Council; instead, each Borough President brings to the Board a consciousness that he represents a county party organization with which (unless he is a Fusion official) he ordinarily has close ties, and that he has the formal capacity to claim that he

speaks, as no other member of the Board can, for the special interests of his borough. These are claims difficult to dispute, risky to ignore. Moreover, the Borough Presidents sense their common cause as a group in the Board, maintain together a practice of "borough courtesy" which they often succeed in persuading the citywide members to observe, while in addition they seek to join with the Comptroller in a bargaining alliance which can guide the Board in the majority of its decisions.

7. We note two further facts that distort the occurrence of the 552 possible voting combinations. The first is the Board's "cult of unanimity," W. Sayre & H. Kaufman, supra note 6, at 643, whereby the Board members make efforts, by behind-the-scenes brokering, to reach unanimous decisions. The second is the practical insight provided in the affidavit of Herman Badillo, a former member of the Board, that citywide members are often divided on important issues, at least in part because "the Comptroller and City Council President are often engaged in an ongoing campaign for the Mayor's office," while at the same time the mayor is running for reelection, and because taking different stands on high-profile issues is necessarily part of the citywide members' effort at "distinguishing themselves from one another in their incessant quest for the mayoralty."

8. It may be that citywide representatives will be more responsive to "Brooklyn" interests, because of the greater number of Brooklyn voters. While this may mitigate somewhat the effects of the deviation in voter equality, the mitigation is at best theoretical and in no way substantial enough to counteract the 132.9% deviation.

JON O. NEWMAN, Circuit Judge, concurring:

I concur in Jude Oakes' thoughtful and comprehensive opinion for the Court but add a few words to emphasize what we are invalidating and what representation arrangements remain for future consideration. The New York City Board of Estimate allots two votes to each of its three at-large members and one vote to each of its five borough representatives. On budget matters, the mayor cannot vote, leaving only two at-large members, each with two votes; the mayor's authority to influence budget decisions derives from his power to veto the budget. It is this precise arrangement of voting power that we find unconstitutional under circumstances where the aggregate deviation from equality among the five boroughs is 132 percent.

As Judge Oakes acknowledges, we are not confronted with an arrangement whereby at-large voting power in the Board of Estimate substantially outweighs the combined voting power of the borough representatives. That could be accomplished either by increasing the number of votes cast by each at-large member or by increasing the number of at-large representatives, even if each is only a single vote; combinations of these two approaches are also possible.

Until today the only cases considering the constitutionality of representation arrangements that combine district representation with at-large representation have involved bodies in which the voting power of the at-large members was a small fraction of the total voting power. In most of these cases, there was only one at-large member (entitled to cast one vote), compared to several district representatives. E.g.,

Avery v. Midland County, 390 U.S. 474 (1968) (one at-large out of five-member body); Perry v. City of Opelousas, 515 F.2d 639 (5th Cir. 1975) (one out of six); Martin v. Venables, 401 F. Supp. 611 (D. Conn. 1975) (one out of eleven); Markoe v. Legislature of Virgin Islands, 592 F.2d 188 (3d Cir. 1979) (one out of fifteen). One case involved four at-large members, but they were still a minority of a thirteen-member body. Latino Political Action Committee, Inc. v. City of Boston, 568 F. Supp. 1012 (D. Mass.), stay denied, 716 F.2d 68 (1st Cir.), stay denied, 463 U.S. 1319 (Brennan, Circuit Justice, 1983). With the at-large representation so insubstantial, the courts examined only the deviations of the populations of the districts. Deviations among the districts were found impermissible in Avery, Martin and Latino, and acceptable in Perry and Markoe. In our

case the voting power of the at-large members is relatively larger: they have a one-vote majority of the voting power on the Board of Estimate (six of eleven votes), though they lack even this edge on budget matters (four out of nine votes).

At some point, the size of the voting power of the at-large members, compared to that of the district members, would make the at-large representation not only relevant but decisive on the issue of constitutionally valid apportionment. If a body included 100 at-large members, for example, the existence of one representative from each of five districts of different populations could not seriously be thought to offend constitutional standards. Especially as to local governmental bodies, where apportionment standards are applied with some flexibility, see Abate v. Mundt, 403 U.S. 182, 185 (1971), equal protection requirements do not

prohibit inventive arrangements that combine substantial representation of the electorate at-large with single-member districts of differing populations. The Equal Protection Clause forbids arrangements under which the voting strength of voters in one or more small districts outweighs the voting strength of voters in one or more large districts and district representatives exercise substantial voting power within the elected body. But where at-large representatives have the dominant voting power, the allotment of at least one voice and vote to each of a small number of districts, regardless of size, preserves the virtues of local representation without sacrificing principles of equal protection.

Doubtless it will be difficult in some cases to draw the line between adequate and inadequate at-large voting power. At one extreme, it is clear that 100 at-large

members would be sufficient to tolerate even large deviations among the populations of five single-member districts. At the other extreme, it is clear that one at-large member is insufficient to tolerate such deviations, as Avery and Martin demonstrate, and even that four out of thirteen are insufficient, as Latino demonstrates. In our case, I agree that at-large voting power of six out of eleven on most issues and four out of nine on budget issues is not sufficient to permit us to ignore the substantial aggregate deviation of the five boroughs that each send one representative to the New York City Board of Estimate. That is what we have decided; what we have not decided, and need not decide, is the point at which an apportionment according substantial voting power to at-large representatives would satisfy constitutional requirements, notwithstanding otherwise unacceptable

deviation among the populations of a small number of single-member districts.

OPINION AND JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NEW YORK, DATED NOVEMBER 19, 1986
81 CV 3920 (ERN)

BEVERLY MORRIS, JOY CLARKE HOLMES, JOANNE OPLUSTIL,

Plaintiffs-Appellees,

v.

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, Individually and as Mayor of the City of New York, ANDREW STEIN, Individually and as City Council President, HARRISON J. GOLDIN, Individually and as Comptroller for the City of New York, HOWARD GOLDEN, DAVID N. DINKINS, FERNANDO FERRER, CLARE SHULMAN, RALPH J. LAMBERTI, each individually and as Borough Presidents of the Boroughs of the City of New York,

Defendants-Appellees,

-and-

FRANK V. PONTERIO,

Intervenor-Defendant,

ROBERT A. STRANIERE, Individually and as a member of the New York State Assembly,

Intervenor-Defendant.

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NEAHER, Senior District Judge

This action challenges the constitutionality of the New York City Board of Estimate ("Board"). Familiarity with previous decisions herein is assumed. See Morris v. Board of Estimate, 551 F. Supp. 652 (E.D.N.Y. 1982), rev'd, 707 F.2d 686 (2d Cir. 1983), on remand, 592 F. Supp. 1462 (E.D.N.Y. 1984).

In brief summary, plaintiff residents of the Borough of Brooklyn instituted this action contending that, pursuant to sections 61 and 62 of the New York City Charter, the allocation of one vote to each Borough President, as members of the Board, contravened the "one person, one vote" rule of the United States Supreme Court because of the widely disparate populations each Borough President represented. This court, following the remand, applied the test adopted by the Supreme Court in Abate v. Mundt, 403 U.S. 182 (1971), and found a deviation of 132.9% as between the populations of Staten Island (Borough of Richmond) (352,121) and Brooklyn (2,230,936). Such a large deviation -- more than 10 times that permitted in Abate (11.9%, coupled with a caution) -- strongly signalled that the Board's present voting allocation is unconstitutional. Mindful, however, of the

Court of Appeals' instruction that this court "rule on the policies and interests which the Supreme Court has held may justify deviations," Morris v. Board of Estimate, 707 F.2d at 690, the parties were directed to submit a joint stipulation setting forth:

> "(1) those agreed valid policies and interests presently served by the Board; and
>
> (2) those disputed policies and interests which at least one defendant maintains are valid and are presently served by the Board ...."

592 F. Supp. at 1477 (emphasis in original).[1]

DISCUSSION

I. Justification Burden

The Supreme Court has made it clear that the existence of malapportionment places the burden upon defendants. As the Supreme Court pointed out in Brown v. Thomson, 462 U.S. 835, 842-43 (1983):

> "A plan with larger disparities ... [than 10%] ... creates a prima

facie case of discrimination and ... must be justified by the State."

Arguably, even were the disproportion explainable, defendants here might ultimately fail their justification task, since the Supreme Court has warned that immoderate inequalities may be intolerable whatever the meritorious objectives. See, e.g., Reynolds v. Sims, 377 U.S. 533, 581 (1964) ("But if, even as a result of a clearly rational state policy ..., population is submerged as the controlling consideration in ... apportionment ..., then the right of all ... citizens to cast an effective and adequately weighted vote would be unconstitutionally impaired."); Gaffney v. Cummings, 412 U.S. 735, 744 (1973) ("[T]he larger variations from substantial equality are too great to be justified by any interest so far suggested.").

Those warnings together with the huge 132.9% inequality afford a basis for the

formidable charge by Citizens Union that the Board's voting plan is facially unconstitutional. See e.g., Preisler v. Mayor of St. Louis, 303 F. Supp. 1071, 1075 (E.D. Mo. 1969) (The 135% deviation for aldermanic wards was beyond excusing.).

Still, despite its admonitions, the Supreme Court has never established a figure for per se illegality. Thus, in Mahan v. Howell, 410 U.S. 315, 329 (1973), the Virginia House of Delegates' 16.4% rationalized deviation was sanctioned, a guarded approval being left indefinite by the Supreme Court's comment that:

> "While this percentage may well approach tolerable limits, we do not believe it exceeds them."

More recently, in Brown v. Thomson, 462 U.S. at 846-48, the majority upheld a plan for the Wyoming House of Representatives, the question presented having excluded an 89% disproportion from

consideration. Joining that circumscribed decision, Justice O'Connor nonetheless emphasized that "clearly some outer limit" to acceptable disparities exists. Id. at 849-50 (O'Connor, J., concurring).

Like the Mahan comment, however, Justice O'Connor's did not specify that "outer limit", obviously because one has not been set. In other words, though consistent with the cautionings against large deviations, these comments indirectly underscore that:

> "[T]he [Supreme] Court has never enunciated specific maximum variations which will invalidate a reapportionment ...."

Boyer v. Gardner, 540 F. Supp. 624, 629 (D.N.H. 1982).

Viewed in that light, not reaching the yet unquantified question of facial unconstitutionality -- if possible -- is preferable and actually follows the Supreme Court's example.

> "We are doubtful ... that the deviations [for the Texas House of Representatives] evident here [about 26%] are the kind of 'minor' variations which Reynolds v. Sims indicated might be justified by ... the maintenance of established political subdivisions .... But we need not reach that constitutional question, for we are not convinced that the announced policy ... necessitated the range of deviations between legislative districts .... [Among other deficiencies in its findings,] the District Court [did not] articulate any satisfactory grounds for rejecting at least two other plans ..., which respected county lines but which produced substantially smaller deviations from the principles of Reynolds v. Sims."

Kilgarlin v. Hill, 386 U.S. 120, 123-24 (1967). Fortunately, that restrained approach settles the equal protection challenge here. As will be seen, defendants fail their justification burden short of the per se query.

A. Issues

As pointed out in Brown v. Thomson, 462 U.S. at 843 (quoting Mahan v. Howell,

410 U.S. at 328) the general justification stage investigation is:

> "whether the legislature's plan 'may reasonably be said to advance [a] rational state policy' and, if so, 'whether the population disparities among the districts that have resulted from the pursuit of this plan exceed constitutional limits.' "

Dissenting in Brown v. Thomson, 462 U.S. at 852, Justice Brennan elaborated upon that basic inquiry. After a prima facie 10% variance demonstration, the remaining steps are:

> "Second, a court must consider the quality of the reasons advanced by the State to explain the deviations. Acceptable reasons must be 'legitimate considerations incident to the effectuation of rational state policy,' Reynolds [v. Simms, 377 U.S. 533,] 579 [(1964)], and must be 'free from any taint of arbitrariness or discrimination,' Roman [v. Sincock, 377 U.S. 695,] 710 [(1964)]. See Mahan v. Howell, 410 U.S. 315, 325-26 (1973). Third, the State must show that 'the state policy urged ... to justify the divergences ... is, indeed, furthered by the plan.' id., at 326. This necessarily requires a showing that any

> deviations from equality are not significantly greater than is necessary to serve the State's asserted policy; if another plan could serve that policy substantially as well while providing smaller deviations from equality, it can hardly be said that the larger deviations advance the policy. See e.g., Kilgarlin v. Hill, 386 U.S. 120, 123-24 (1967); Mahan, supra, at 319-20, 326 Connor [v. Finch, 431 U.S. 407,] 420-21 [(1977)]. Fourth, even if ... the deviations ... are justified ..., the court must nevertheless consider whether they are small enough to be constitutionally tolerable .... Mahan, supra, at 326."

As a minority opinion, Justice Brennan's explication is not controlling. In a larger perspective, however, his detailed guide is consistent with the majority's broad statement and cogently distills the Supreme Court's antecedent body of law.

Looking to that guide, the first step (the malapportionment stage) has been taken and the fourth (essentially a per se evaluation) will not be for reasons just given. The second and third steps are left,

their respective issues being whether defendants' proffered policies and interests are valid concerning the Board, and if so, whether its current voting plan furthers them.

Regarding the validity issue, the Supreme Court has not precisely defined the characteristics of legitimate goals. See Reynolds v. Sims, 377 U.S. at 579; Roman v. Sincock, 377 U.S. at 710 (both quoted in Brown v. Thomson, 462 U.S. at 852, supra pp. 7-8). See also Swann v. Adams, 385 U.S. 440, 444 (1967) ("satisfactory explanation[s] grounded on acceptable state polic[ies]"); Karcher v. Daggett, 462 U.S. at 740 (objectives "consistent with constitutional norms"). See generally Cohen v. Maloney, 410 F. Supp. 1147, 1151 (D. Del 1976) (considerations "constitutionally acceptable").

Nor has it announced an all-inclusive list. See Karcher v. Daggett, 462 U.S. at 740 ("Any number of consistently applied legislative policies might justify some variance ...."). See generally Tribe, American Constitutional Law, Ch. 13, § 6 (1978) ("[T]he scope of permissible justifications remains unclear.").

Nevertheless, the Supreme Court and lower tribunals have countenanced certain considerations germane here. See generally Charo, Designing Mathematical Models to Describe One-Person, One-Vote Compliance by Unique Governmental Structures: The Case of the New York City Board of Estimate, 53 Fordham L. Rev. 735, 803 (1985) ("Charo") ("[The] Board ... exhibits many, but not all, of the characteristics of local government that the Supreme Court has singled out for special protection from the

stress caused by searching for perfect population equality.").

The furtherance issue explores (in part) whether another plan would "substantially vindicate" the identified rational objectives "yet approximate population equality more closely." Karcher v. Daggett, 462 U.S. at 741. If the answer is yes, the plan under review is constitutionally deficient. See Guido, Deviations and Justifications: Standards and Remedies in Challenges to Reapportionment Plans, 14 Urb. Law. 57, 68 (1982) ("Even though a rational state policy may justify population variances, the courts will not uphold a plan ... if an alternative ... achieves that policy with a lower level of deviation.").[2]

As relevant to those issues, defendants in the Joint Stipulation of Policies and

Interests proffer these considerations in support of maintaining the status quo:

> "1. Absence of any demonstrable injury to the populations of the more heavily populated boroughs as a consequence of requiring equal votes among the boroughs, particularly in light of the presence on the Board of three members - the Mayor, the Comptroller and the City Council President - who are elected by all the voters in all the boroughs, who each have two votes, and who in the aggregate outvote the five borough presidents.
>
> 2. Uniqueness of the Board as a form of local government because of its composition and voting allocation.
>
> 3. Meaningful representation of the citizens of the lesser populated boroughs, especially Staten Island, in Board affairs.[3]
>
> 4. Preservation of the boroughs as legitimate representational entities in local government.
>
> 5. Use of natural and historical borough boundaries to define representational entities in local government.
>
> 6. Historical treatment of the boroughs as separate governmental entities.
>
> 7. Necessity of retaining borough representation on the Board in light of

abolition of such representation on the City Council.

8. Effectiveness of a Board comprised of only eight members.

9. The long-standing dual role of borough representatives as both Borough Presidents and the member of the Board.

10. Coordination of City and borough governmental authority and responsibility.

11. Ability to balance differing interests and needs, and to accommodate development and long-term planning requirements of both the boroughs and the City as a whole.

12. Flexibility to meet changing societal needs, particularly in a large municipality whose local government is complex.

13. Correlation between the functions of the Board and the impact of those functions upon the boroughs, particularly in regard to the formulation of the capital budget, in order to assure that different parts of the City get their fair share of service contracts and capital budget allocation which might otherwise go to those portions of the City contributing the most tax dollars.

14. Necessity and effectiveness of borough representation in local government as an intermediate size entity, with city-wide representation

being larger and community board representation being smaller.

15. Ability of the Board as presently constituted to eliminate undue concentration of executive power and to supplement the City Council, which retains the general legislative power of the City.

16. Effectuation of delegated police-power responsibilities.

17. Equality of voting power on the Board among the boroughs, as boroughs."

1. Validity Issue

Four of the foregoing policies and interests must be rejected as manifestly invalid.

No Injury (Number 1)

The asserted absence of harm disregards the Supreme Court's decisions to the contrary. See e.g., Chapman v. Meier, 420 U.S. 1, 24 (1975) ("The basis for the District Court's allowance of the 20% variance [among senatorial districts for the North Dakota Legislative Assembly] is

claimed to lie in the absence of 'electorally victimized minorities' .... [A] variance of this degree [in a court-ordered plan] cannot be justified simply because there is no particular racial or political group whose voting power is minimized or canceled. All citizens are affected when an apportionment plan provides disproportionate voting strength, and citizens in districts that are underrepresented lose something even if they do not belong to a specific minority group.").

Directly put, the 132.9% variance evidences the harm - as have mathematical assessments of legislative designs since the early years of judicially mandated suffrage equality.

> "[O]vervaluation of the votes of those living here has the certain effect of ... undervaluation of the votes of those living there. The

> resulting discrimination against those individual voters living in disfavored areas is easily demonstrable mathematically. Their right to vote is simply not the same right to vote as that of those living in a favored part of the State. Two, five, or 10 of them must vote before the effect of their voting is equivalent to that of their favored neighbor."

Reynolds v. Sims, 377 U.S. at 563.

Moreover, the political harm should come as no surprise to those defendants who were also parties in Andrews v. Koch, 528 F. Supp. 246 (E.D.N.Y. 1981), aff'd, 688 F.2d 815 (2d Cir.), aff'd sub nom. Giacobbe v. Andrews, 459 U.S. 801 (1982). There, after isolating a 50.4% variance among these same boroughs under the City Council's former plan, this court said:

> "On the undisputed facts it is obvious that a voter in the Bronx or Staten Island gets substantially more representation for his or her ballot than a voter in Brooklyn or Queens. The effect is to deprive voters in the latter boroughs of an equal opportunity to participate in the political process."

Id. at 251.

Defendants' contention that no injury occurs, partially due to the city-wide members' supposed salutary effect on the disparity, is essentially an attempted relitigation of the malapportionment methodology and deviation issues. In deciding those issues, the court extensively examined and distinctly rejected the at-large mitigation argument, concluding that:

> "Nor does the city-wide presence dictate adjusting [the] methodology [to account for their alleged influence on the disproportion]. As prior decisions properly have done, the at-large representation should be eliminated from the deviation computation. That approach comports with the Board's existing theoretical relationships, with the common sense limitation on valid mathematical assessment and, ultimately, with the Supreme Court's guidance."

Morris v. Board of Estimate, 592 F. Supp. at 1475.

To be fair, the perspective of the city-wide representatives on the Board surely contributes to its performance. See e.g., New York State Charter Revision Commission Report at 84 (1975) ("The Board ... is well structured to make important political decisions and to resolve conflicts between city-wide and local interests ... Its mixture of city-wide and borough officials provides a balanced perspective."); Kramarsky Aff. and Ex.: "The Kramarsky Study" at 115 ("These three officials are concerned with the welfare of the city as an entity; it is left to the Borough Presidents to add local ... opinion to the Board's deliberations. Needless to say, the Borough Presidents are equally as concerned with city-wide policy .... It must be recognized, however, that they are often subjected to more intense local pressures.").

In that vein, defendants have put forth other concerns enveloping the benefits of the at-large members' "big picture" orientation. See Joint Stipulation of Policies and Interests: Numbers 10, 11 and 13. In contrast, when proposing - as in Number 1 - that the city-wide officials ameliorate the 132.9% disproportion so no inequality injury is incurred, defendants collide head on with elementary reapportionment jurisprudence and the law of this case.

Uniqueness (Number 2)

The Board's purported uniqueness is likewise unavailing, although for discussion's sake its truth is assumed. See Professor Heywood T. Sanders' Sup. Aff. in Support of Pl. Motion for Summary Judgment at 4 ("[The] Board ... has no precise analogue in other cities, as it constitutes the last example of a 'bicameral' local legislature."). But see Morris v. Board of Estimate, 592 F.

Supp. at 1468 ("[T]he Board's essential [borough and at-large] electoral design is unexceptional ....") (emphasis in original) (examples cited).

Cognizable considerations must have some political utility, as do "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives." Karcher v. Daggett, 462 U.S. at 740. Uniqueness, a static quality, serves no such pragmatic purpose. See generally, Reynolds v. Sims, 377 U.S. at 579 ("legitimate considerations incident to the effectuation of a rational state policy") (emphasis added.).

Police Power (Number 16)

Police power fares no better for a different reason. See Br. of I. Def. Ponterio at 27 ("The State ... has made it eminently clear that in delegating police

power to municipalities it places great importance on such municipalities having strong and effective governments.") (citing N.Y. Const. art. IX, § 1 (McKinney 1969); N.Y. Exec. Law § 150 (McKinney 1982)).

Where uniqueness offered too little, police power offers too much. Presumably, all States desire strong local governments for facilitating the provision of municipal services. See Avery v. Midland County, 390 U.S. 474, 481 (1968) ("[State l]egislators ... do not attempt to reach those countless matters of local concern .... [I]n providing for [local] governments ..., the States characteristically provide ... for decisionmaking at the local level .... In a word, institutions of local government have always been a major aspect of our system, and their responsible and responsive operation is today of increasing importance to the quality of life ....").

That generality removes police power as a legitimate aim candidate. See Karcher v. Daggett, 462 U.S. at 741 ("The State must ... show with some specificity that a particular objective required the specific deviations in its plan, rather than simply relying on general assertions.").

Equal Borough Votes (Number 17)

The last consideration rejected is equal Board voting power for the boroughs. The one borough, one vote proposition clashes with the one person, one vote rule. The Constitution does not mandate identical votes for boroughs with widely disparate populations. See Andrews v. Koch, 528 F. Supp. at 249 (Rejecting a muted version of the same representational reasoning, this court said: "[T]he difficulty with defendants' position is that the Supreme Court has consistently adhered to quite different standards in assessing the

conformity of electoral plans to constitutional requirements.").

It directs, instead, that any citizen shall have a vote equal to any other citizen -- no matter the borough of either. See Dunn v. Blumstein, 405 U.S. 330, 336 (1972) ("In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.").

It is a citizen's right -- not a borough's -- which is the equal protection center of attention. See Reynolds v. Sims, 377 U.S. at 561 ("[T]he rights allegedly impaired are individual and personal in nature .... While the result of a court decision ... may be to require the restructuring of the geographical distribution of seats in a state legislature, the judicial focus must be concentrated upon ascertaining

whether there has been any discrimination against certain ... citizens which constitutes an impermissible impairment of their constitutionally protected right to vote."). For this quantitative case, the one person, one vote rule means all citizens are to possess parity of franchise - not the Borough Presidents.

A subsidiary point is pressed to sustain the status quo.

> "A change in the Board's composition and voting strength would be a breach of an implied condition under which [Staten Island] gave up its own self governance and entered into Greater New York in 1898 and would result in [its] residents ... being deprived of a chance to influence decisions which have a great impact upon their county's future."

Aff. of John J. Marchi at 19.

Obviously, any such tacit agreement has been nullified by post Baker v. Carr, 369 U.S. 186 (1962), caselaw. In 1968, the Supreme Court placed local governmental

units within the equal protection mantle. See Avery v. Midland County, 390 U.S. at 478-79 ("The question ... is whether the Fourteenth Amendment ... forbids the election of local government officials from districts of disparate population. [W]e hold that it does."). In 1983, the Second Circuit did the same with the Board. See Morris v. Board of Estimate, 707 F.2d at 690 ("[T]he Board ... is selected by popular election and performs general governmental functions. The principle of one person, one vote is therefore applicable."). This latter day jurisprudence abrogated Staten Island's turn of the century, implied condition. Thus, in all respects, the equal borough votes consideration is not "constitutionally acceptable." Cohen v. Maloney, 410 F. Supp. at 1151.

Turning now to defendants' remaining policies and interests, these will be

appraised in groups also as to their validity, and if weathering that issue, as to their furtherance by the Board's voting plan.[4]

Historical (Numbers 5, 6 and 9)

Since the 1898 consolidation, the boroughs have comprised the City. Correspondingly, since the 1901 Charter, the Board has reflected the metropolitan makeup with its Borough President membership.

Unquestionably, the City's government has centralized with authority moving from the boroughs. See Aff. of Loring McMillen at 6 ("[T]hrough several charter revisions, the powers of the Borough Presidents were decreased substantially with many responsibilities shifted to the Mayor."). Similarly, citizen-borough ties have loosened. See Aff. of Edward L. Sadowsky at 4-5 ("[T]here has been a considerable erosion in the identity which citizens make with the boroughs in which they live .... [T]he

citizens of the Bronx and Brooklyn ... are likely [to] refer to themselves as coming from communities within a borough rather than the borough itself.").

Notwithstanding, whether primary residential referents or not, the boroughs are areas of dwelling. As such, they continue to be political entities for purposes of voting and representation in City affairs. Thus, the Board of Education, the Board of Trustees of the City University, the Industrial Development Agency, the Board of Elections and the Planning Commission are all statutorily required to have (appointive) borough representation. See N.Y. Educ. Law § 2590-b (McKinney 1981); id. § 6204 (McKinney 1985); N.Y. Gen. Mun. § 917 (McKinney 1986); N.Y. Elec. § 3-200 (McKinney 1978); New York City Charter & Ad. Code Ann. § 192 (Williams Press 1976), respectively.

As with those City agencies, the Board's time-rooted membership evidences on-going borough residential-political consciousness. Against that background, history is a valid concern as to the Board. See Abate v. Mundt, 403 U.S. at 186 ("Rockland County defends its plan by asserting the long history of, and perceived need for, close cooperation between the county and its constituent towns .... For over 100 years, the five town supervisors were the only members of the county board, a system that necessarily fostered extensive interdependence between the towns and their county government.").

Natural Boundaries (Number 5)

Entwined with the historical consideration is respect for natural boundaries, also a judicially recognized objective. See Reynolds v. Sims, 377 U.S. at 578-79 (mentioning it and other goals as

potentially legitimate). When consolidated, the boroughs were mainly divided along geopolitical lines. See e.g., New York State Charter Revision Commission Report at 5 (1973) ("The borough of Manhattan was comprised of Manhattan, Governor's, Bedloe, Ellis, Oyster, Blackwell's, Randall's and Ward's Islands."). With its borough delegates, the Board retains a deference for those divisions. Heeding natural boundaries is an acceptable consideration.

Integrity of Political Subdivisions
(Numbers 4, 6, 7, 9 and 14)

For clarification, acknowledging the integrity of political subdivisions means accounting for the boroughs as subordinate governmental units. This category may be the strongest. See Abate v. Mundt, 403 U.S. at 185 ("[A] desire to preserve the integrity of political subdivisions may justify [a local government's] apportionment plan which departs from numerical equality

...."); Brown v. Thomson, 462 U.S. at 843 ("[T]he Court in Reynolds v. Sims ... singled out preservation of political subdivisions as a clearly legitimate policy.").

Plaintiff's [sic] particularly concede that:

> "this interest is clearly cognizable .... Each of the five vestigial county government[s] constitutes a political subdivision of the City ... deserv[ing] to have its integrity respected .... As long as the chief executives of the county governments are representatives on the Board, there will be no necessity to compromise the integrity of these subdivisions."

Aff. of Richard Emery and Ex. in Support of Summary Judgment at 34-35. See generally Greenwald v. Board of Supervisors of the County of Sullivan, 567 F. Supp. 200, 210 (S.D.N.Y.), aff'd, 742 F.2d 1434 (2d Cir. 1983) ("New York's public policy to 'maintain municipal boundary lines in the [apportionment] of counties for representation purposes' is a 'legitimate

consideration' ...") (brackets by Greenwald court). The court subscribes to the parties' agreement.

Effectiveness

(Numbers 4, 8, 10, 11, 12, 13 and 14)

Effectiveness, the "ab[ility] to accomplish a purpose," Webster's Third New International Dictionary at 724, is an objective which the State has expressly embraced.

> "Effective local selfgovernment and intergovernmental cooperation are purposes of the people of the state."

N.Y. Const. art. IX, § 1 (McKinney 1969). See also N.Y. Exec. Law § 150 (McKinney 1982) ("The future welfare of the state depends in large measure on the effectiveness of local government and of its relationships to state government ....").

From 1901, the Board has been composed of those elected borough and city-wide officials with the greatest

metropolitan influence. That small, mixed assembly has proven conducive to accomplishing the Board's mission.

> "The strength of the Board ... rests, in part, on its mission 'to direct the business of the City.' It is the ability to resolve policy and priority disputes that characterizes the Board's ... preeminent position in the city government. The members ... each publicly elected, each with a broad and diversified constituency, and each in an executive position ..., represent a far greater consensus than any other executive body. Their relatively small number enables them to act more decisively than most legislatures."

Kramarsky Study at 16. See, e.g., Aff. of Edward I. Koch at 1 ("[T]he Board operates very effectively ... in helping to govern this complex city. Indeed, in the mid-1970's, the Board struggled with - but weathered - the most serious fiscal crisis with which any major American city has had to grapple in modern history.").

Concomitantly, by interacting with the matters presented to it, the Board has accumulated experience, in turn, contributing to greater effectiveness.

> "The resources of the City ... are limited, though the demands made ... are infinite. Therefore, resource allocation is necessary. The Board ... is the one [body] which has developed systems and expertise in the resolution of conflict between local and city-wide interest."

Kramarsky Study at 102. See e.g., id. at 66 ("[The Board]) ... posesses [sic] the intangible advantage of almost 70 [now over 80] years of experience with franchise questions ...."). See generally New York State Charter Revision Commission Report at 84 (1975) ("[The Board] has been a magnet for issues that require deliberative judgments in the best interests of the City as a whole, and it has repeatedly been assigned responsibility for sensitive matters

... not ... adequately handled by other bodies or officials.").

For the most, the litigants once again join, agreeing that the Board is effective.[5] See Charo, 53 Fordham L. Rev. at 739 ("[T]he Board represents a concentration of legislative, executive and administrative power in the hands of the eight most pre-eminent local officials ... making it efficient and effective ...."). Cf. Franklin v. Krause, 344 N.Y.S.2d 885, 888-89 (1973), appeal dismissed, 415 U.S. 904 (1974) ("[Nassau County's] small board ... is the most efficient form of government, and has proved to be such over the years.").

The court concurs, adding that, with regard to the Board, effectiveness is "a satisfactory explanation grounded on [an] acceptable state policy." Swann v. Adams, 385 U.S. 440, 444 (1967).[6]

Meaningful Representation of Smaller Boroughs in Board Affairs (Numbers 3, 4, 7, 9, and 14)

Meaningful representation, another suggested concern, poses a formulation problem. See generally Note, Fair and Effective Representation: Power to the People, 26 Hastings L.J. 190, 206 (1974) ("Fair and effective representation defies precise definition."). For defendants, meaningful representation of smaller boroughs is evidently Board voting equivalence with large boroughs. As previously noted, the one borough, one vote notion is antithetical to the one person, one vote rule. The smaller boroughs must settle for less. Cf. Morris v. Board of Estimate, 707 F.2d at 691 ("[T]he fact that a minority may regularly be overshadowed by its more populous neighbors under a proportional voting scheme is one characteristic of a representative democracy.").

Plaintiffs, in contrast, point out that:

> "Meaningful representation for the lesser populated boroughs is achieved when their borough presidents have influence and power over Board decisions [, approximately in proportion to population represented]."

Aff. of Richard Emery and Ex. in Support of Summary Judgment at 38.[7] See generally Iannucci v. Board of Supervisors of the County of Washington, 282 N.Y.S.2d 502, 508 (1967) ("[In a weighted voting system, t]he principle of one man-one vote is violated ... when the power of a representative to affect the passage of legislation by his vote ... does not roughly correspond to the proportion of the population in his constituency.").

So understood, meaningful representation is a cognizable objective, given the Board's small borough membership. See Morris v. Board of Estimate, 592 F. Supp. at 1476-77 (authorities therein). See

generally Brown v. Thomson, 462 U.S. at 843 ("There ... can be no question that Wyoming's constitutional policy - followed since statehood - of using counties as representative districts and ensuring that each county has one representative is supported by substantial and legitimate state concerns.").

Checking the Mayor, and Supplementing City Council (Numbers 7, 14 and 15)[8]

The offsetting of power among coordinate institutions is a fundamental of American democracy. See United Public Workers v. Mitchell, 330 U.S. 75, 91 (1947) ("By these mutual checks and balances ... democracy undertakes to preserve the liberties of the people from excessive concentrations of authority."); Youngstown Co. v. Sawyer, 343 U.S. 579, 593 (1952) ("[The nation's founders] rested the structure of our central government on the

system of checks and balances. For them the doctrine of separation of powers was not mere theory; it was a felt necessity.") (Frankfurter, J., concurring).

The separation of powers' principle is not limited to the federal government but, as the New York Court of Appeals has made clear, is applicable to this State, and, as modified, to this City.

> "One of the fundamental principles ... underlying our Federal Constitution is the distribution of governmental power into three branches - the executive, legislative and judicial - to prevent too strong a concentration of authority in one person or body .... We have consistently recognized that this principle of separation of powers among the three branches is included by implication in the pattern of government adopted by the State ....
>
> Of course, the pattern of government established for New York City by the City Charter is not identical to that of the United States or the State .... Still, the City Charter does provide for distinct legislative and executive branches ... Thus, our prior

> decisions have held that ... the Mayor may not unlawfully infringe upon the legislative powers reserved to the City Council ...."

Under 21 v. City of New York, 492 N.Y.S.2d 522, 525-26 (1985) (The Mayor usurped the City Council's legislative power by promulgating an Executive Order barring City contractors from discriminatory employment practices involving "sexual orientation of affectional preference."). See also Subcontractors Trade Assoc. v. Koch, 477 N.Y.S.2d 120, 124, (1984) (Under a separation of powers analysis, the New York Court of Appeals held that the Mayor encroached on the City Council's legislative terrain by issuing an Executive Order directing that small, local businesses share 10% of City construction contracts.).

While not a formal executive or legislative branch member, the Board, with its county contingent participating, assists in markedly curbing extradepartmental

ascendancy. The Mayor, in particular, is checked, since having no budget and only two Board votes his role is limited. See generally W. Sayre & H. Kaufman, Governing New York City at 651 (1960) ("[T]he Board is not often led by the Mayor; instead, it unites against him if necessary, absorbs him into the Board as a member without special status if it can."). That circumscribed influence in a prominent political body curbs the Mayor in general. See id. at 632 ("The Mayor's membership on the Board is an asset to the Board, a liability to the Mayor.").

Along with restraining the Mayor, the Board supplements the City Council's role by providing a major forum for Borough Presidents to voice county interests.[9] See e.g., Andrews v. Koch, 528 F. Supp. at 251 (This court noted, among other avenues, that "channel[] of communication ... between the boroughs and City Hall."). See

generally Reynolds v. Sims, 377 U.S. at 580 ("A consideration that appears to be of more substance in justifying some deviations ... is that of insuring some voice to political subdivisions ....").

In sum, the Board, structurally embodying a county faction, counterbalances to an unusual extent the Mayor as well as supplementing the City Council. Those last suggested policies and interests "are consistent with constitutional norms." Karcher v. Daggett, 462 U.S. at 740.

2. Furtherance Issue

Validating the foregoing policies and interests lightens but does not relieve defendants of their burden of justification. They must also demonstrate that no alternative plan would satisfactorily embrace the legitimate considerations and diminish the deviation. If another alternative would do so, then the present plan "may [not]

reasonably be said to advance" the accepted goals. Mahan v. Howell, 410 U.S. at 328.

In Karcher v. Daggett, 462 U.S. at 741, the Supreme Court reconfirmed that options are within the justification stage.

> "The showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the State's interests, the consistency with which the plan ... reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely."

See also id. at 742 n.12 (In holding unconstitutional New Jersey's congressional reapportionment plan with disparities unrelated to the professed objective of preserving racial minority voting strength, the Supreme Court noted that at oral argument the State had suggested other considerations. After pointing out that those were not properly before it, the Supreme Court continued: "Furthermore,

several plans before the Legislature with significantly lower population deviations [enveloped those aims].").

Confusing alternatives with remedies, defendants disavow the formers' relevance. See e.g., Attorney's Aff. of Susan R. Rosenberg at 1 ("[A]ll this discussion is premature and ... inappropriate. The issue before the Court is not remedy, but the underlying merits.").

To the contrary, scrutinizing alternatives -- not remedies -- is undeniably appropriate at this point. See e.g., Kilgarlin v. Hill, 386 U.S. at 123-24 (quoted supra pp. 6-7); Travis v. King, 552 F. Supp. 554, 561-62 (D. Hawaii 1982) ("Assuming [Hawaii] could have drawn districts of equal populations ... -- and no evidence to the contrary was presented -- the maximum deviations ... would have been substantially reduced ... Based on this

substantial and wholly unjustified increase in total deviation, we find that the state plan, as it relates to the state house of representatives, fails to reasonably further the state's expressed policy and is thus unconstitutional.").

Plaintiffs recognize the reasonableness of examining other schemes, having all along suggested plans that incorporate the accepted aims while reducing the disproportion.[10] See Connor v. Finch, 431 U.S. 407, 420 (1977) (In rejecting a more strictly inspected court plan with a 16.5% deviation, the Supreme Court said that, "[P]laintiffs ... submitted ... an alternative [Mississippi] Senate plan that served the state policy against fragmenting county boundaries better than did the plan the court ultimately adopted, and [with a 13.66% variance] also came closer to achieving districts that are 'as nearly of equal

population as is practicable.' Reynolds v. Sims, [377 U.S.] at 577.").

As one example, plaintiffs point to a weighted voting system keeping the Board's form but reworking its ballot allocation to correlate with the markedly unequal borough populations. Developed by Professor Steven J. Brams, whose expertise was noted in Morris v. Board of Estimate, 592 F. Supp. at 1474, this option has 7.8% whole and 18.2% budget Board inequalities.

Professor Lee Papayanopoulos, who has been retained by over thirty county boards of supervisors to assign computer derived voting weights to representational plans, endorses Professor Brams' design, emphasizing that:

> "These very interests are ... of substantial concern to the participants in most of the schemes I have designed .... The towns which comprise New York counties each have their own history, boundaries, integrity, desire for a voice, need not to be dominated

> and desire to have effective county government .... [E]very town has an overriding concern that county government will respect its special needs and integrity.
>
> ... [T]his is accomplished ... by ... a weighted voting scheme. Weighted voting schemes parcel out voting power ... in a manner that guarantees each town its fair share, its voice on the critical votes. Because every town representative knows that he or she has a meaningful share of the critical votes, deference and collegiality develop which usually avoid close (critical) votes. But when critical votes do occur every town knows that its voice means something.

Aff. of Professor Lee Papayanopoulos at 3-4. Cf. Franklin v. Krause, 344 N.Y.S.2d 885, 889 (1973), appeal dismissed, 415 U.S. 904 (1974) ("[T]o preserve unit boundary lines and the concomitant efficiency in the rendition of local services, without creating a monstrous legislative body, virtually necessitates a weighted voting system [for Nassau County's Board of Supervisors] which can approach as closely as possible

the one man, one vote principles ....") (emphasis in original).

Although rejecting the relevance of alternatives, defendants attempt some rebuttal. For instance, they maintain that weighted voting ignores the relationship between the at-large and borough contingents.

To explain, under Professor Brams' system, the city-wide members would have twenty votes apiece, in the aggregate sustaining their majority status. The borough delegates would be assigned votes by population, with the Staten Island representative at one end receiving three and the Brooklyn representative at the other receiving sixteen. Critical of such a distribution, city defendants question:

> "Does it really make sense that [the Brooklyn] borough president, representing 31.5% of the City's population, should have 80% of the voting power of the Mayor, Comptroller [or] City Council

President, all of whom have been elected by the City as a whole?

Attorney's Aff. of Susan R. Rosenberg at 2-3.

Adopting, for the moment, city defendants' perspective (i.e., in measuring the deviation, the at-large and borough votes should be collectively assessed), the answer is that it makes as little or as much sense as --- under the present plan --- allocating to the Staten Island Borough President 50% of a city-wide official's ballot strength when he represents roughly 5% of the metropolitan population. The question is nonsensical because it derives from a faulty formula for calibrating the Board's composite mode, and simply highlights the analytical pitfalls of gauging together the distinct delegate sets.

Professor Brams, consistent with his previous approved refusal to disperse the city-wide members' conjectured vote influence

among the boroughs, see Morris v. Board of Estimate, 592 F. Supp. at 1474 & n.15, again separates the two representational tiers to calculate the suggested plan's disparity. The ccurt, as before, agrees with that methodological perspective and rejects city defendants' restated criticism.

Intervenor defendant Straniere and amicus Marchi chiefly protest that the smaller boroughs would have no say under Professor Brams' suggested weighted voting system. Professor Papayanopoulos, however, has met that complaint. See also Greenwald v. Board of Supervisors of the County of Sullivan, 567 F. Supp. 200, 203 (S.D.N.Y.), aff'd, 742 F.2d 1434 (2d Cir. 1983). ("Adjusted weighted voting has been recognized as a means of overcoming malapportionment ... in local legislative bodies and to assure that sparsely populated areas ... have a voice in the councils of government."); Lijphart,

Comparative Perspectives on Fair Representation: The Plurality-Majority Rule, Geographical Districting, and Alternative Electoral Arrangements at 150, in Representation and Redistricting Issues (B. Grofman ed. 1982) ("One of the main advantages of weighted voting is to give representation to small districts without violating equal per capita representation and without making the legislature too large ....").

Besides the weighted voting option, plaintiffs have suggested other alternatives, several founded on a proportional representation structure (each borough having delegates corresponding to population) coupled with three respective methods of electing those individuals (adjusted district voting, limited voting and successive approval voting).

It would appear that proportional representation would more closely honor the one person, one vote dictate. See Still, Political Equality and Election Systems, 91 Ethics 375, 384 (1981) ("[Theoretically, under that system,] each group ought to be represented in the same relative numbers as it would be if the entire electorate were to meet as a direct democracy.") Also, depending on the process employed, proportional representation would advance some accepted objectives, since (except for adjusted district voting) borough-wide representation would be retained.

Noting that a proportional representation system was brought up before in this suit, city defendants comment that it "received a negative reaction as expensive, cumbersome and essentially duplicative of the City Council." Attorney's Aff. of Susan R. Rosenberg at 2. The adverse response was

not unmerited as even plaintiffs admit, since Board membership would increase to at least nineteen, thereby negating "the legitimate interest in preserving the small size of a Board." Aff. of Richard Emery and Ex. in Support of Summary Judgment at 42 n.20.

Straniere mainly complains that with proportional representation the boroughs would be carved into districts (each approximately Staten Island's population) causing the City's "balkanization" and preventing the Board's ability to continue "as an efficient and effective governing body for this extremely diverse City." Aff. of Robert A. Straniere at 21-22. At least as to physical subdividing, Straniere is only partially correct. That would occur with adjusted district voting -- not with the other suggested procedures. More importantly, even that choice would appear preferable to the current plan with its enormous deviation.

Finally, plaintiffs have previously mentioned other possible designs. One such substitute, which might sufficiently promote the identified goals and comport with equal protection, is a borough residency requirement comparable to that cautiously allowed in Dusch v. Davis, 387 U.S. 112, 114-15 (1967).

Summarizing the furtherance issue, alternatives have been suggested that would "substantially vindicate" the accepted policies and interests "yet approximate population equality more closely." Karcher v. Daggett, 462 U.S. at 741. See also Connor v. Finch, 431 U.S. at 420. The existing plan with its much greater departure from franchise equality does not advance the valid policies and interests. See Mahan v. Howell, 410 U.S. at 328. Kilgarlin v. Hill, 386 U.S. at 123-24.

That being so, defendants have failed to carry their requisite justification burden. See Karcher v. Daggett, 462 U.S. at 741-42 & n.12; Travis v. King, 552 F. Supp. at 561-62. See also Cosnor v. Dalton, 552 F. Supp. 350, 358-59 (E.D. Va. 1981). Accordingly, since equal protection is transgressed by the unexcused malapportionment, the Board's voting plan under sections 61 and 62 of the New York City Charter is held to be unconstitutional.

II. Remedy

Based on the foregoing, the Board's voting plan must be recast. That is a legislative task, the judiciary's role being restricted to seeing that a constitutional plan is enacted in a timely manner. See Wise v. Lipscomb, 437 U.S. 535, 540 (1978) ("When a federal court declares an existing apportionment scheme unconstitutional, it is ... appropriate ... to afford a reasonable

opportunity for the legislature to meet constitutional requirements by adopting a substitute measure .... The new legislative plan ... will then be the governing law unless it, too, is challenged and found to violate the Constitution.")

Consistent with its circumscribed role, the court underscores that, while the preceding justification discussion noted the availability of possible alternatives, by no means are they recommended for implementation. See e.g., Chapman v. Meier, 420 U.S. 1 25-26 (1975). ("Special Master Ostenson['s devised model] demonstrates that [certain asserted concerns do not] prevent[] attaining a significantly lower population variance. We do not imply that the Ostenson plan should be adopted by the District Court ... What we intend ... is to show that th[ose] factors ... cannot be viewed as ... persuasive when other, less

statistically offensive, plans already devised are feasible.") (emphasis added).

CONCLUSION

During this justification stage, defendants have proposed numerous policies and interests that are valid in relation to the Board. Plaintiffs, however, have presented alternative plans that appear to respond to the accepted objectives and decidedly decrease the variance; necessarily, the current legislative plan does not further those legitimate aims. Defendants, as a result, have not justified the Board's present ballot allocation with its large 132.9% deviation from the one person, one vote rule.

Therefore, the court grants plaintffs' motion for summary judgment and declares sections 61 and 62 of the New York City Charter violative of the equal protection clause of the fourteenth amendment to the

United States Constitution. To remedy that illegality, city defendants are enjoined to undertake curative measures with all deliberate speed, allowing for likely appeals. The Board, in the meantime, shall continue to perform its duties under the present plan.

SO ORDERED.

Dated: Brooklyn, New York
November 19, 1986

/s/ _____
U.S.D.J.

FOOTNOTES

1. Received along with the parties' current submission was a request by Dr. John F. Banzhaf III to appear as an amicus curiae. Evidently, he has reviewed some of the litigation's latest documents but - oddly - not the 1984 decision settling the methodology and deviation issues. Correspondingly, Dr. Banzhaf's tender is largely directed at decided questions or manifests an analysis contrary to the law of the case. Therefore, given his after-the-fact orientation, Dr. Banzhaf's amicus offer must be declined. See 3A C.J.S. Amicus Curiae, § 3, at 423 (1973) ("[T]he court may ... refuse [an amicus curiae motion], according as it deems the proffered information timely and useful ....").

2. The parties' current submissions are not precisely reflective, but addressing the validity and furtherance issues was directed.

> "[The litigants are to list those contested] policies and interests which at least one defendant maintains are valid and are presently served by the Board."

Morris v. Board of Estimate, 592 F. Supp. at 1477 (emphasis added). The parties' papers, in any event, adequately cover these questions.

3. Unlisted Number 18 is Number 3 with "representation" replaced by "participation." In a quantitative reapportionment suit, such as this, see

Morris v. Board of Estimate, 592 F. Supp. at 1465-66, the two terms are really one, participation being a function of representation.

> "[R]epresentative government is in essence self-government through ... elected representatives ... and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature."

Reynolds v. Sims, 377 U.S. at 565. Number 18, accordingly, is subsumed under Number 3.

4. Plaintiffs now acknowledge that, in the main, defendants' proposed aims are cognizable. At the same time, they stress that the 132.9% disproportion is unforgiven because optional plans, which foster the genuine objectives at lower variances, are available.

> "The heart of plaintiffs' response ... is that a Board with an equal vote for ... each borough is unnecessary to satisfy the interests .... Since none of the concededly valid interests requires the [present] voting

> dilution ..., no justification exists for deviating from one person, one vote strictures."

Aff. of Richard Emery and Ex. in Support of Summary Judgment at 32-33 (emphasis in original). While somewhat more resistant, Citizens Union does join plaintiffs for the most part. Regarding the remaining considerations, the court largely agrees with plaintiffs' revised view.

5. Amicus Citizens Union demurs, basically making two, objections. First they call into question the concept's nonspecificity. The dictionary meaning, however, is a serviceable enough yardstick. Second they challenge the Board's performance. See e.g., New York State Charter Revision Commission Report at 86 (1975) ("Some public criticism ... is directed at [Board] procedures alleged to be unresponsive, inconvenient or undemocratic.") But see Kramarsky Study at 20 ("Much ... criticism ... is directed at procedures .... More often that not, the real objection is to the decision of the Board rather than to the method of achieving it."). Despite accounting for such criticism, this fact remains: The Board has been generally commended for the very effectiveness that even plaintiffs early on admitted. See Morris v. Board of Estimate, 592 F. Supp. at 1476 n. 18, 1477 n.20.

6. As with the rejected police power consideration, effectiveness, at least on the surface, suffers some overbreadth. But the Board's competence has been attested to and - importantly -

contrasted with other civic bodies. See e.g., New York State Charter Revision Commission Report at 18 (1900); New York State Charter Revision Commission Report at 84 (1975). This goal, in short, has not been attained by all local governmental institutions. That narrowing distinction renders the Board's effectiveness an "explicit, precise" concern meriting validation. Karcher v. Daggett, 462 U.S. at 734 n.6.

7. The essence of the bracketed portion is contained in a weighted voting discussion immediately after the quoted sentence. See id. at 39. It should be stressed, though, that proportionality is certainly not mandated by the Constitution. See Davis v. Bandemer, 106 S. Ct. 2797, 2809 (1986) ("Our cases ... clearly foreclose any claim that the Constitution requires proportional representation ....").

8. Plaintiffs do not take-up in their policies and interests analysis section the Board supplementing the City Council, a consideration limited by the court to mean providing a forum for borough-wide representation. See infra pp. 33-34 & note 9. Plaintiffs do briefly address this objective before, acknowledging it as "no doubt true." Aff. of Richard Emery and Ex. in Support of Summary Judgment at 26. In not amplifying on the Board-City Council relationship, plaintiffs have failed as well to list the related concerns (Numbers 7 and 14). The Court has done so.

9. Intervenor defendant Straniere regards these two political bodies form another vantage point, the Board supplementing the City Council's powers. Given the Board's structure, that seems a minimizing misperception.

10. Plaintiffs, in fact, do not maintain that all their suggested alternatives advance all the credited aims. See discussion infra p. 40. Nor do plaintiffs have to. See Karcher v. Daggett, 462 U.S. at 741 (quoted supra p. 10).

EDITOR'S NOTE

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No. _____

Supreme Court of the United States
OCTOBER TERM, 1987

FRANK V. PONTERIO,

Appellant,

v.

BEVERLY MORRIS, JOY CLARKE HOLMES, and JOANNE OPLUSTIL,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPELLANT'S APPENDIX
(Volume II—Pages 119-241)

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MEMORANDUM AND ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK,
Dated August 21, 1984
81 CV 3920 (ERN)

BEVERLY MORRIS; JOY CLARKE HOLMES; JOANNE OPLUSTIL,

Plaintiffs,

-against-

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of New York, CAROL BELLAMY, individually and as City Council President, HARRISON J. GOLDIN, individually and as Comptroller for the City of New York, HOWARD GOLDEN, ANDREW STEIN, STANLEY SIMON, DONALD MANES, ANTHONY GAETA, each individually and as Borough Presidents of the boroughs of the City of New York,

Defendants,

-and-

FRANK V. PONTERIO,

Intervenor-Defendant,

ROBERT A. STRANIERE, individually and as a member of the New York State Assembly,

Intervenor-Defendant.

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NEAHER, District Judge.

In December 1981, plaintiffs filed suit charging that the New York City Board of Estimate ("Board") deprived them of equal protection under the fourteenth amendment to the United States Constitution. More

precisely, as Brooklyn residents, plaintiffs maintained that sections 61 and 62 of the New York City Charter, outlining the Board's legislative plan, devalued their ballots by violating the one person, one vote rule. See 1 New York City Charter & Ad. Code Ann. §§61-62 (Williams Press 1976 & Supp. 1982-83).

In December 1982, however, the court held that the Board was not subject to that constitutional principle. The court, as a consequence, granted summary judgment to defendants -- the Board and its members ("city defendants") -- as well as to intervenor-defendant Frank V. Ponterio, a Staten Island resident. Morris v. Board of Estimate, 551 F. Supp. 652, 657 (E.D.N.Y. 1982).

In May 1983, the Second Circuit reversed.

> "[W]e conclude that the Board . . . is selected by popular election and performs general governmental functions. The principle of one person, one vote is therefore applicable."

Morris v. Board of Estimate, 707 F2d 686, 690 (2d Cir. 1983). The Second Circuit, furthermore, remanded with instructions:

> "[T]he district court must determine the degree of malapportionment present (after deciding on the appropriate methodology for doing so) and rule on the policies and interests which the Supreme Court has held may justify deviations from the literal one person, one vote formula."

Id. (footnote omitted).

On return, plaintiffs moved for summary judgment; but, after conferring with the court, the parties stipulated that the proceedings should be bifurcated. In the first stage, the most suitable mathematical measure would be identified and superimposed over the Board's electoral scheme to ascertain the malapportionment. If

more than a minor deviation were disclosed, the Supreme Court approved policies and interests served by the Board would be discerned in the second stage to settle the variance's acceptability.[1]

In accordance with that agreed course, the court has reviewed the submissions, the record and the law. Based on that examination, the court holds, as to the first stage issues, that the Supreme Court's methodology in Abate v. Mundt, 403 U.S. 182, 184 & n.1 (1971), is the appropriate standard and, when applied, reveals a 132.9% maximum deviation. The reasons impelling these holdings will be set forth after a brief relation of the limited facts pertinent to this suit's present posture.

FACTS

The court and the Second Circuit have detailed the uncontested facts in the prior opinions. To forego needless repetition,

reference is made to those previous treatments. Morris v. Board of Estimate, 551 F. Supp. at 653-55, rev'd, 707 F.2d at 687-88. Accordingly, only those facts particularly germane to the instant issues will be recounted.

The Board is one of New York City's governing bodies and consists of eight members, who -- importantly -- are a mixture of at-large (city-wide) and district (borough) representatives. As delineated in sections 61 and 62, the Mayor, Comptroller and City Council President possessing two Board votes each, are selected by the metropolitan electorate as a whole. The Borough Presidents of Brooklyn, Queens, Manhattan, Bronx and Staten Island (Richmond), having one Board vote each, are chosen by their respective borough constituencies.[2]

As manifest from the 1980 federal census, the boroughs range appreciably in population.

Borough	Population
Brooklyn	2,230,936
Queens	1,891,325
Manhattan	1,427,533
Bronx	1,169,115
Staten Island	352,121

Yet, notwithstanding that sweep where Brooklyn as the largest has more than six times the population of Staten Island as the smallest, each borough has but one assigned Board vote. That difference in population but equivalence in franchise is the primary basis for plaintiffs' charge that, as Brooklyn residents, the Board's legislative design violates their right to equal protection.

DISCUSSION

I. Methodology

A. The Abate Test

Broadly grouped, reapportionment disputes fall into two categories: quantitative and qualitative.

> "In [a strictly quantitative] case, there are a number of coordinate districts . . . and voters in larger districts allege that their votes are devalued in comparison to those of voters in smaller ones. The issue in a typical reapportionment case, therefore, is whether population deviations from the average district are impermissibly large . . . . The comparison is one based purely on population figures; no showing of discrimination along racial, ethnic, or political lines need be shown."

Nevett v. Sides, 571 F.2d 209, 215 (5th Cir. 1978), cert. denied, 446 U.S. 951 (1980) (emphasis added).

A distinctly qualitative suit, in contrast, transcends straightforward computations.

> "[T]he theory of the qualitative reapportionment action is more subtle and abstruse. This action alleges that district lines were drawn or erased so as to diminish the political input of a cognizable element of the voting population."

Corder v. Kirksey, 585 F.2d 708, 710 n.2 (5th Cir. 1978), cert. denied, ___U.S.___, 103 S. Ct. 1253 (1983). See also The Supreme Court 1982 Term - Elections, 97 Harv. L. Rev. 135, 139 (1983) ("Elections") ("[F]air apportionment has two dimensions, one 'quantitative' and the other 'qualitative'. The quantitative dimension -- captured by the one-person-one-vote standard -- requires that each individual's vote be of equal weight, and is compromised when districts are of unequal population. Mere numerical equality among voting districts, however, 'does not guarantee "substantive equality in the sharing of power." ' The qualitative dimension, therefore, requires that individuals be able to act in effective

voices in representation.") (emphasis in original) (footnotes to citations omitted).[3]

Here, though, plaintiffs have limited their attack to the quantitative aspect by intentionally omitting qualitative contentions. See, e.g., Pl. Br. at 28 n.65[4] ("[Plaintiffs'] argument is not, at this time, . . . a racial discrimination claim under the Equal Protection Clause."). Necessarily then, as a quantitative action, this suit's outcome is governed mainly by the Board's variance from the one person, one vote principle. See, e.g., Andrews v. Koch, 528 F. Supp. 246, 252 (E.D.N.Y. 1981), aff'd, 688 F.2d 815 (2d Cir. 1982), aff'd sub nom. Giacobbe v. Andress, ___U.S.___, 103 S. Ct. 32 (1982) ("The issue . . . does not implicate questions of political, racial or ethnic discrimination. Simply stated, the question is whether the allocation of an equal number of at-large Council seats to each of the five

boroughs, without regard to substantial population disparities, comports with the constitutional rule of substantial numerical equality . . . .").

While perhaps dispositive in a quantitative suit such as this, deviation from population equality is "fundamental in reapportionment litigation" in general. League of Women Voters of Nassau County v. Nassau County Board of Supervisors, No. 83-7602, slip op. at 3913 (2d Cir. May 22, 1984). As the Supreme Court has pronounced,

> " ' Population is . . . the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies.' "

Reynolds v. Sims, 377 U.S. 533, 567 (1964) (quoted in League of Women Voters of Nassau County v. Nassau County Board of Supervisors, No. 83-7602, slip op. at 3914 (2d Cir. May 22, 1984) (emphasis added and

footnote omitted by the Second Circuit). See Abate v. Mundt, 403 U.S. at 185 ("[E]lectoral apportionment must be based on the general principle of population equality and . . . this . . . applies to state and local elections."). See also Note, The Reapportionment Dilemma: Lessons from the Virginia Experience, 68 Va. L. Rev. 541, 569 (1982) ("Reapportionment Dilemma") ("Population equality remains the single most important factor in judicial evaluation of apportionment schemes.").

After that elemental investigation of the deviation, any subsequent steps depend on the variation exposed. In Brown v. Thomson, ___U.S.___, ___, 103 S. Ct. 2690, 2696 (1983), the Supreme Court described that disparity's contingent effect on a more searching probe.

> "[W]e have held that 'minor deviations from mathematical equality among state legislative

> districts are insufficient to make out a prima facie case of indivious discrimination . . . so as to require justification by the State.' [Citation omitted.] Our decisions have established . . . that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations . . . . A plan with larger disparities . . . creates a prima facie case of discrimination and therefore must be justified by the State."[5]

Discovering where the Board's legislative plan sets within the Brown variational framework begins with selecting a methodology. Fortunately, the Supreme Court has eased that choice by its demonstrated impatience with mathematical metaphysics.

> "These are the figures found by the District Court. Appellee . . . argues [for] another method of computation . . . . The State and the city . . . disputed that the deviation . . . was as much as claimed. . . . We decline to enter this imbroglio of mathematical manipulation and confine our consideration to the figures

actually found by the court . . . ."

Mahan v. Howell, 410 U.S. 315, 319 n.6 (1973) (emphasis added). See Boyer v. Gardner, 540 F. Supp. 624, 628 (D.N.H. 1982) ("[Mahan] indicate[s] a reluctance to involve the courts in statistical complexities, at least absent reasons to indicate that a more complicated approach is required . . . .").

Consistent with that perceived disinclination to entertain esoteric, result-oriented equations, the Supreme Court has approved a simple methodology -- the Abate test -- named for the case in which it was sanctioned.

> "An accepted measure . . . is that of maximum percentage deviation from the population mean. Such a formula was approved by the Supreme Court in Abate v. Mundt, 403 U.S. 182 . . . (1971). The maximum percentage deviation is determined by adding the percentage deviation above the population mean of the

> district with the greatest number of voters to the percentage deviation below the population mean of the district with the fewest number of voters."

Flateau v. Anderson, 537 F. Supp. 257, 261 n.7 (S.D.N.Y. 1982) (three judge court), appeal dismissed, 458 U.S. 1123 (1982). See Brown v. Thomson, ___U.S. at ___, 103 S. Ct. at 2701 ("We have come to establish a rough threshold of 10% maximum deviation . . . (adding together the deviations from average district size of the most underrepresented and most over-represented districts) . . . ."") (Brennan, J., dissenting). See also Andrews v. Koch, 528 F. Supp. at 250 ("This is the formula devised by the Supreme Court to measure the extent to which population disparities among legislative districts either conform or fail to conform to the constitutional requirement of substantial population equality."). See generally Guido, Deviations

and Justifications: Standards and Remedies in Challenges to Reapportionment Plans, 14 Urb. Law. 57, 58 (1982) ("Guido") ("Variances are most commonly expressed as a percentage range, which is the sum of the percentage by which the most populous district exceeds the mathematical ideal and the percentage by which the least populous district falls short of that ideal.").[6]

Besides being simple, the Abate test is also adaptable to disparate representational designs. To illustrate, in Abate itself, the multi-member voting plan of New York State's Rockland County was studied. Abate v. Mundt, 403 U.S. at 184. In White v. Weiser, 412 U.S. at 785, congressional districting in Texas was gauged with that standard.

Assuredly, the Abate test has calibrated apportionment forms more intricate than the Board's. In Andrews v. Koch, 528

F. Supp. at 250, this court modified that measure to isolate the disparity of the New York City Council, which presented a blend of single-member districts, floterial-member districts, at-large member boroughs and an at-large member city.

In that same respect, the New York Court of Appeals in Franklin v. Krause, 344 N.Y.S.2d at 887 used the Abate test to review the Nassau County Board of Supervisors' weighed voting plan. See also League of Women Voters of Nassau County v. Nassau County Board of Supervisors, No. 83-7602, slip op. at 3891 (2d Cir. May 22, 1984) (surveying with the Abate test that same legislative model after a 1980 census-induced reapportioning).

In brief, the Board's mixed structure of five borough members with one vote each and three at-large members with two votes

each certainly does not preclude employing the Abate test, given its proven versatility.

B. Defendants' Methodologies

Despite the settled Abate test's simplicity and adaptability, defendants contend that it is unserviceable here due to the Board's three at-large members. The Second Circuit, also, presumed in dicta that their presence posed unique questions.

> "[T]he fact that three members . . . are elected at large . . . raises novel issues as to how an individual voter's opportunity to elect these members should be assessed in conjunction with his opportunity to elect his borough representative."

Morris v. Board of Estimate, 707 F.2d at 690 n.3.

Actually, the Board's essential electoral design is unexceptional and does not present first-impression measurement problems. Indeed, the Board's at-large and borough amalgam compares to other governing bodies

exercising legislative functions, whose apportionments have been assessed utilizing the Abate test. See, e.g., Latino Political Action Committee, Inc. v. City of Boston, 568 F. Supp. 1012, 1015 (D. Mass. 1983), stay denied, 716 F.2d 68 (1st Cir. 1983), stay denied, ___U.S.___, 104 S. Ct. 5 (Brennan, Circuit Justice, 1983) (City Council and School Committee plans of Boston, Massachusetts, with each having four at-large and nine district members); Cohen v. Maloney, 410 F. Supp. 1147, 1149 & n.2, 1150 (D. Del. 1976) (City Council of Wilmington, Delaware, with four at-large and five district members). See generally Markoe v. Legislature of the Virgin Islands, 592 F.2d 188, 190-91 & n.2 (3rd Cir. 1979) (Senate of Virgin Islands with one at-large -- a St. John's Island resident -- and fourteen members evenly divided between two districts); Perry v. City of Opelousas, 515

F.2d 639, 641 & n.2 (5th Cir. 1975) (Board of Aldermen of Opelousas, Louisiana, with one at-large and five district members); Martin v. Venables, 401 F. Supp. 611, 613, 614 & n.2 (D. Conn. 1975) (Town Council of Stratford Connecticut, with one at-large and ten district members).

Like those polities, the Board's basic structure is a composite pattern. And as those polities have been, the Board also can be gauged by the Abate test -- irrespective of the at-large representation.

In short, sufficient decisional precedent exists to avert -- as unwarranted -- an unchartered departure from the Supreme Court's approved standard. See id. ("[T]he Supreme Court has indicated that total maximum deviation is the measure to be used and this Court is obligated to use it." See also Dodge & McCauley, Reapportionment: A Survey of the Practicality of Voting

Equality, 43 U. Pitt. L. Rev. 527, 536 (1982) ("[T]he . . . Supreme Court, the lower federal courts, and the various state courts have developed a relatively precise and simple mathematical model for the measurement of population equality. The basic standard . . . is determined by the relationship between the population of the largest and smallest election district . . . .").

Concomitantly, the court rejects defendants' flawed tests. To particularize, city defendants would forego all mathematical analysis.

> "[T]he Court's methodology . . . should be functional . . . . First, the Court should identify the constitutional objectives of the one person, one vote principle. Second, the Court should undertake a qualitative inquiry into the Board's scheme of representation."

City Def. Br. at 5.

That procedure is not the law. Abate aside, as discussed, population equality is the "starting point" and "controlling criterion." Reynolds v. Sims, 377 U.S. at 567. See Cohen v. Maloney, 410 F. Supp. at 1150 ("[S]tate and local governments have a duty . . . to make population the prime criterion in any apportionment . . . ."); Grisbaum v. Jefferson Parish Council, 336 F. Supp. 267, 271 (E.D. La. 1971) ("The . . . Supreme Court has consistently held that the controlling criterion . . . is that the Constitution permits no substantial variation from equal population . . . .") Cf. Connor v. Finch, 431 U.S. 407, 409-10 (1977) ("[B]oth the Senate and the House reapportionments . . . fail to meet the most elemental requirement . . . -- that legislative districts be "as nearly of equal population as is practicable.' ") (quoting

Reynolds v. Sims, 377 U.S. at 577) (emphasis added).

While city defendants might prefer that it not do so, the law does require that population equality be the reapportionment referrent and, consequently, deviations therefrom be marked off. Plainly stated, that inequality audit cannot be foregone.

Intervenor defendant Ponterio, on the other hand, does not neglect the variance's ascertainment but advances a specially tailored methodology.

> "I have developed an analysis which both recognizes the Board's overlay of city-wide and borough votes and examines every voting rule under which the Board functions."

September 30, 1983, Aff. of I. Def. Ponterio at 8.

That analysis is premised on equating the Board to a floterial district.

> "The Board may be looked upon as a single floterial district, the super-district being the City and the sub-districts the five boroughs. Each Borough President is a sub-district representative and the city-wide members are the super-district representatives."

Id. at 9.[7] Therein lies the foundational fault.

By analogy or otherwise, the Board is not akin to a "single floterial district." In Davis v. Mann, 377 U.S. 678, 686 n.2 (1964), the Supreme Court defined that model.

> " '[F]loterial district' . . . refer[s] to a legislative district which includes . . . several separate districts . . . which independently would not be entitled to additional representation but whose conglomerate population entitles the entire area to another seat in the particular legislative body being apportioned."

See, e.g., Boyer v. Gardner, 540 F. Supp. at 626 ("When any town . . . [etc.] . . . has fewer than the number of inhabitants

necessary to entitle it to one representative, [floterial] districts with enough inhabitants to entitle the district to one or more representatives.").

No definitional plasticity can liken the Board to an immense floterial district. The Board is an entire legislative model while a floterial district is but a component. See, e.g., Mahan v. Howell, 410 U.S. at 318-19 ("The statute apportioning the [Virginia House of Delegates] provided for a combination of 52 single-member, multimember, and floater delegate districts from which 100 delegates would be elected.") Boyer v. Gardner, 540 F. Supp. at 626 (A plan which reapportioned the New Hampshire House of Representatives "establish[ed] 162 electoral districts, of which 17 were so-called floterial districts.") (footnote omitted).

Additionally, Ponterio's matching the dissimilar leads him to questionable

"accommodations". September 30, 1983, Aff. of I. Def. Ponterio at 10. Weighting each delegate's vote is one such problematical adjustment.

> "Each city-wide member's vote is weighted by the population he represents . . . viz., the total city population of 7,071,030. Each Borough President's vote is weighted by his borough's population."

Id. at 11.

That accommodation distorts the city-wide members' voting power. Despite in reality having only a 6-5 ballot advantage, the at-large have a 3-1 Board dominance (by individual) under Ponterio's methodology.[8] Described another way, Ponterio augments the Board's city-wide total by the metropolitan population three times, whereas he enhances the Board's borough total by the metropolitan population just once (since the five boroughs' aggregate population

equals one times the metropolitan population).

Increasing the city-wide members' strength to that extent demonstrably decreases the found deviation. To elaborate, since Ponterio computes the combined effect of the city-wide and borough representation, the bolstered at-large presence so overwhelms the borough delegation that the population inequalities among the boroughs are not even roughly translated into the ascertained disparity.

Comparing results illustrates the deviation's marked diminution and its unrelatedness to the unequal borough populations with Ponterio's approach. As noted, Brooklyn has more than six times Staten Island's population. When the disproportion between the two (as the most underrepresented and overrepresented boroughs) is calculated by either the

Supreme Court's Abate test or a (suggested) modification thereof, the yield is 132.9% or 78%, respectively. See infra p. 31 and Pl. Br. at 32-33. Those figures vary substantially from one another but both are credibly high, reflecting the considerably unequal borough populations, which are at the base of each computation and at the heart of this lawsuit.

In contrast, when calculated by Ponterio's methodology, the deviation plummets to 16.4%. See September 30, 1983, Aff. of I. Def. Ponterio at 18 (Table IX).[9] That percentage has no plausible relationship to the indisputable inter-borough population differences. To the contrary, as partially a product of the weighting accommodation, which itself flows from the unsound floterial premise, that figure mutes the discrepancies among the boroughs.

But even apart from such flaws, the court would reject Ponterio's methodology as it would city defendants'. Neither is needed. As seen, the Supreme Court sanctioned Abate test has assessed apportionments of comparable and of greater complexity. That being so, promulgation of a special formula is uncalled for in this case.

C. The Unmodified Abate Test

The remaining methodological question, then, is whether the Abate test must be modified to account for the at-large representation. Plaintiffs, as mentioned, do proffer one such adjusted measure similar to that used in Andrews v. Koch, 528 F. Supp. at 250. See Pl. Br. at 32-33. The court, nonetheless, determines conversion unnecessary.

At the time of Andrews, the City Council consisted of forty-six seats: one (the President) was city-wide; thirty-five

were from districts and ten were from the boroughs (i.e., two from each). Andrews v. Koch, 528 F. Supp. at 248.[10] In fact, three of those thirty-five districts were floterial. Id. at 250 n.6. Yet, despite that confluence of several representational types, the equal protection challenge was aimed solely at the disparity caused by the five borough delegate pairs.

Notwithstanding that focus, the court rejected the depiction of the five boroughs as multimember districts distinct from those councilmanic districts within the boroughs or shared by two boroughs. The Court, instead, decided that the total electoral dynamic within each borough had to be surveyed in arriving at the real deviation. Id. at 250 n.7.

To accomplish that, the court modified the Abate test to encompass the full complement of each borough's councilpersons,

viz., the two borough-wide delegates, the district delegates from within each borough and the floterial district delegates by proportional share. Id. at 250.

In this case, that variety of borough delegate layers is missing. Thus, while the one person, one vote challenge is also aimed at the borough representation, only one such delegate tier, in fact, sits on the Board -- the Borough Presidents. So, differing from Andrews which required a multidimensional gauge for measuring the combined representational voices from each borough, this case necessitates only a linear methodology. Put differently, each borough voter has one designated borough agent on the Board -- the Borough President. That straight line, one-to-one relationship easily lends itself to an unmodified Abate analysis.

Nor does the city-wide membership subvert the Abate test. Courts faced with

mixed designs have simply excluded the at-large positions from the malapportionment mathematics. See, e.g., Latino Political Action Committee, Inc. v. City of Boston, 568 F. Supp. at 1015 (In figuring the 23.6% deviation for the Boston, Massachusetts' City Council and School Committee plans with thirteen members each, the court measured only the respective nine single-member districts, disregarding the respective four at-large seats.); Cohen v. Maloney, 410 F. Supp. at 1150 (In calculating the 18.3% disparity for Wilmington, Delaware's City Council, the court only assessed the eight single-member districts, without considering the five at-large slots.); Perry v. City of Opelousas, 515 F.2d at 641 & n.2 (In determining the 6.2% disproportion for Opelousas, Louisiana's Board of Aldermen, the court focused on the five single-member districts, without factoring in the one

at-large member.); Martin v. Venables, 401 F. Supp. at 613, 614 & n.2 (In arriving at the 50.7% variance for Stratford, Connecticut's Town Council, the court audited the ten single-member districts, omitting the one at-large position.).

Significantly, when charges of one person, one vote violations have been brought in other suits involving these same boroughs, the purported impacts of the city-wide delegates have not been considered. In Oliver v. Board of Education, 306 F. Supp. 1286 (S.D.N.Y. 1969), a challenge rooted in the boroughs' unequal population dispersal was made to New York City's Board of Education, consisting of five electees from the boroughs and two at-large appointees selected by the Mayor.

In holding that the legislative scheme was constitutionally infirm, the court

concentrated only on the interborough population discrepancies without taking into account any influence the mayoral at-large appointees might have had on the malapportionment.

> "[F]ive members . . . are to be elected, one from each county. The other two are to be appointed by the mayor. It is clear beyond question that plaintiff's vote for the Kings County [Brooklyn] member will carry less weight than the votes of residents of other counties for the representatives of those counties."

Id. at 1289.

Similarly, as already noted, this court in Andrews v. Koch, 528 F. Supp. at 248, 250, did not include in the New York City Council's measurement the one actual at-large representative -- the President. Instead, the equal protection inquest was focused completely at the boroughs -- the locus of the inequality.

While that official's tie-breaker status constituted limited voting power, see 1 New York City Charter & Ad. Code Ann. §23(d) (Williams press 1976 & Supp. 1982-83), making any assumed effect on the boroughs' disparity probably de minimus and certainly difficult to accurately ascertain, the pertinence for this case is that no such measurement was attempted. The City Council President's presence relative to the malapportionment was disregarded.[11] See generally Avery v. Midland County, 390 U.S. 474, 476, 485 (1968) (In reaching its decision that the one person, one vote rule applied to local governments and, hence, to the Commissioners Court of Midland County, Texas, the Supreme Court marked the "vast imbalance" without discussing the one at-large representative's impact other than noting that that person "vote[d] only to break a tie.").

To be sure, in Oliver and Andrews as well as in the cases cited from other jurisdictions, whether to exclude the at-large representation was not an explicit issue. Nor should it have been. In an ideal plan, a voter regardless of location has as equal an opportunity to elect an at-large delegate (and thereby be heard) as any other voter.[12] See City of Mobile v. Bolden, 446 U.S. 55, 78 (1980) ("There can be . . . no claim that the 'one person, one vote' principle has been violated . . . because . . . Mobile is a unitary electoral district and the Commission elections are conducted at large."). See generally Dusch v. Davis, 387 U.S. at 115-16 (In approving the electoral design for Virginia Beach, Virginia's City Council consisting of seven at-large members, who were residents of particular boroughs, and four other at-large members, who were chosen without regard to

residency, the Supreme Court stated that, "The Seven-Four Plan makes no distinction on the basis of race, creed, or economic status or location. Each of the 11 councilmen is elected by . . . all the electors in the city. . . . If a borough's resident on the council represented in fact only the borough . . . , different conclusions might follow.") (emphasis added).

By parity of reasoning, at-large members in an untainted representational scheme are beholden to no individual district (or borough) but serve the electorate as a whole. [13] Cf. Fortson v. Dorsey, 379 U.S. at 438 (In finding no constitutional defect in Georgia's state senatorial reapportionment plan requiring county-wide elected senators to be residents of districts within certain counties, the Supreme Court said that, "The statute uses districts . . . as the basis of

residence . . . not for . . . representation. Each district's senator must be a resident of that district, but since his tenure depends upon the county-wide electorate he must be vigilant to serve . . . all the people in the county . . . ; thus . . . he is the county's and not merely the district's senator.") (emphasis added); Markoe v. Legislature of the Virgin Islands, 592 F.2d at 190 (In reviewing the apportionment of the Virgin Islands' fifteen-person Senate where one at-large electee had to be a St. John's Island resident, the court applying Fortson concluded that, "[T]he senator at large must be counted as a representative of the entire territory . . . . ").

Hence, at least in principle, a quantitative vote devaluation such as occurs among substantially unequal single-member districts is absent in an at-large design.[14] See City of Mobile v. Bolden, 446 U.S. at 66

("The constitutional objection to multimember districts . . . cannot be that . . . they depart from apportionment on a population basis . . . ."). See also Packer, Tracking the Court Through a Political Thicket: At-Large Election Systems and Minority Vote Dilution, 23 Urb. L. Ann. 227, 258 (1982) ("By definition, an at-large district treats all voters equally. . . . At-large districting does not involve the individual deprivation characteristics of a fundamental rights violation.") (footnote omitted).

So, failing to assess the at-large membership's impact on the deviations in the cited cases conformed to the theoretical relationships that those representatives had with their electorates. Quite correctly then, the measurements converged on where the inequalities were -- among the districts (the Board's borough equivalents).

Besides being in harmony with those theoretical relationships, deleting the at-large tacitly accorded with a common sense mathematical limitation. To the point, evaluating the effect -- if any -- of at-large representation on inter-district inequality means speculatively assigning those at-large votes among the districts. If that step is taken and the limitation thereby ignored, a deviational figure of doubtful validity is received.

With respect to this case, Professor Steven J. Brams, who specializes in applying mathematical models to legislative patterns, stresses the infecting discretion inbred in such an assignment and advances a preventive approach.

> "[A]ny quantitative method for analyzing the Board that attempts to allocate the citywide members' votes among the boroughs is inevitably arbitrary and ad hoc . . . . In my opinion, the most appropriate methodology for

> analyzing the representation of individual citizens on the Board . . . is one which treats the two groups of representatives separately."

App. to Pl. Br., Aff. of Professor Brams at 5 (emphasis in original).[15]

The court accepts that common sense view and, extending therefrom, perceives that the absence of the at-large exclusion issue in the cited decisions was not merely due to advocate oversight. On the contrary, as shown by the cited authority, the caselaw appears too consistent to be the product of such persistent inadvertence.

Indeed, as opposed to oversight, certain cases demonstrate a conspicuous purposefulness in omitting the at-large from the measurement, as here, of hybrid legislative models. See Markoe v. Legislature of the Virgin Islands, 592 F.2d at 190-91 & nn. 2-3 (The court reviewed two apportionment plans for the Virgin Islands'

fifteen-person Senate. Under the proposed "8-7" plan, the larger of two districts would have eight senators and the smaller seven. Under the "7-7-1" scheme, which was in effect, each district had seven; and, in addition, one senator was elected at-large, although required to be a resident of the smaller district. In isolating the respective 9.9% and 3.5% disparities, the court included all fifteen members in the "8-7" plan's measurement but only fourteen members in the "7-7-1" scheme's assessment, specifically excluding the one at-large senator.); Grisbaum v. McKeithen, 336 F. Supp. at 272 (The Jefferson Parish Council of New Orleans, Louisiana, had four representatives from single-member districts, two serving two districts each and one elected at-large. In separately calculating a 60% variance among the single-member districts and a 40% deviation between the sets of multiple

districts, the court did not gauge the impact of the at-large on either.).

Thus, independent of not being explicitly raised, the at-large exclusion issue's nonappearance in the noted decisions seems traceable, in part, to an unstated understanding that infusing the malapportionment formula with the electorate-wise representation would have been conjectural adulteration. But whether or not that caselaw distillation is correct, this case explicitly raises that issue; and this court recognizes the speculative contamination inherent in injecting the city-wide membership into the inequality calculus. At the least, the prior decisions are consistent with that recognition.

Finally, deleting the at-large in those previous cases accords with the Supreme Court's example. For, as mentioned, the Supreme Court has exhibited a

> "reluctance to involve the courts in statistical complexities, . . . absent reasons to indicate that a more complicated approach is required. . . ."

Boyer v. Gardner, 540 F. Supp. at 628. Cf. League of Women Voters of Nassau County v. Nassau County Board of Supervisors, No. 83-7602, slip op. at 3917 (2d Cir. May 22, 1984) ("[T]he Supreme Court's review of State and local government legislative plans has been noteworthy for the nonpromulgation of strict mathematical tests.") (emphasis in original). The at-large's surmised influence on district disproportions would not have been a reason to engage more sophisticated methodologies (of suspect reliability).[16]

To summarize this discussion section, unlike the New York City Council's more intricate electoral design confronted in Andrews, the Board's simpler at-large and borough legislative plan is accessible to the

unmodified Abate test. Nor does the city-wide presence dictate adjusting that methodology. As prior decisions properly have done, the at-large representation should be eliminated from the deviation computation. That approach comports with the Board's existing theoretical relationships, with the common sense limitation on valid mathematical assessment and, ultimately, with the Supreme Court's guidance.

D. The Unmodified Abate Test Applied

Therefore, the Abate test is not only applicable, but applicable without modification. As thus applied, the individual inequalities are:

Borough	Population	Deviation
Brooklyn	2,230,936	-57.7%
Queens	1,891,325	-33.7%
Manhattan	1,427,533	- 0.9%
Bronx	1,169,115	+17.4%
Staten Island	352,121	+75.2%

Computing the -57.7% variance of Brooklyn as the most underrepresented borough with the +75.2% variance of Staten Island as the most overrepresented borough, the maximum deviation is 132.9%.

II. Justifications

The present voting allocation would appear to be unconstitutional. See Abate v. Mundt, 403 U.S. at 187 (The Supreme Court approved an 11.9% justified deviation but added that "[N]othing we say today should be taken to imply that even these factors could justify substantially greater deviations . . . . "); Mahan v. Howell, 410 U.S. at 329 (The Supreme Court accepted a 16.4% variance, which was also excused, but remarked that "While this percentage may well approach tolerable limits, we do not believe that it exceeds them.").

Nevertheless, this court has been instructed to "rule on the policies and

interests which the Supreme Court has held may justify deviations . . . ." Morris v. Board of Estimate, 707 F.2d at 690. Moreover, addressing such possible justifications conforms with the parties' stipulation bifurcating these proceedings. Accordingly, the court will now outline the areas of inquiry and initial approach for this second stage.

Since the Second Circuit's opinion, the Supreme Court has further elaborated on specific, legitimate justifications. In Karcher v. Daggett, __U.S.__, __, 103 S. Ct. 2653, 2663-64 (1983), within the context of the more stringently scrutinized congressional districting,[17] the Supreme Court advised:

> "Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding

> contests between incumbent Representatives. As long as the criteria are nondiscriminatory, . . . , these are all legitimate objectives that . . . could justify minor population deviations."

(Emphasis added.) See Elections, 97 Harv. L. Rev. at 141 ("[Karcher] does substantially broaden -- at least in dicta -- the range of interests that the [Supreme] Court will consider.") (emphasis in original).

In Brown v. Thomson, ___U.S. at ___, 103 S. Ct. at 2696, rendered the same day, the Supreme Court restated certain considerations noted in Karcher and previously reckoned as acceptable for state and local governments.

> "We have recognized that some deviations from population equality may be necessary to permit the States to pursue other legitimate objectives such as 'maintain[ing] the integrity of various political subdivisions' and 'provid[ing] for compact districts of contiguous territory.' "

(Citation omitted; brackets by Brown Court.) See Elections, 97 Harv. L. Rev. at 137 n.14 ("Brown illustrates the [Supreme] Court's greater willingness to tolerate population deviations in state legislative apportionments when such deviations are justified by an appropriate state policy. The [Supreme] Court upheld . . . a Wyoming statute providing that each county was to be given at least one representative in the state house . . . . Wyoming's longstanding . . . policy of using counties as representative districts was supported by . . . legitimate . . . concerns and . . . the incremental dilution of the challengers' voting power resulting from . . . granting . . . a representative to the least populous county was de minimis.").

During the justification inquiry then, the parties are to look to those areas mentioned in Karcher and Brown -- if

appropriate -- plus any other pertinent areas reviewed by the Supreme Court in earlier cases. See, e.g., Abate v. Mundt, 403 U.S. at 186 ("The need for intergovernmental coordination is often greatest at the local level . . . But because almost all governmental entities are interrelated . . . , we would be hesitant to accept this justification by itself. To us, therefore, it is significant that Rockland County has long recognized the advantages of having the same individuals occupy the governing positions of both the county and its towns.").

Besides express Supreme Court statements, guidance in establishing or refuting proposed interests also may be sought from other judicial precedent in general accord with the Supreme Court's pronouncements. See, e.g., Andrews v. Koch, 528 F. Supp. at 251 ("[T]he interests

defendants urge in support of the status quo appear to be essentially political."); Cohen v. Maloney, 410 F. Supp. at 1154 ("[N]atural boundaries may sometimes be regarded as a legitimate consideration justifying a particular apportionment plan . . . . [S]uch boundaries may create communication and association barriers of substantial significance in the administration of local government. . . . The facts of this case, however, do not suggest that the Brandywine [River] is a natural boundary which has traditionally been of significance in the administration of local government.").

The parties, in addition, are to examine two particular concerns already raised in the record. First, the Board's conceded effectiveness is to be addressed.[18] See generally Franklin v. Krause, 344 N.Y.S.2d 888-89 ("It has been argued to us, without material opposition, that the small board

. . . is the most efficient form of government, and has proved to be such over the years.").

Second, the parties are to explore the alleged meaningful participation by the lesser populated boroughs in Board affairs under its present structure.[19] See Reynolds v. Sims, 377 U.S. at 565-66 ("[T]he achieving of fair and effective representation for all citizens is . . . the basic aim of legislative apportionment . . . .") (emphasis added); Travis v. King, 552 F. Supp. at 560 ("[T]he . . . rationale advanced by the state [of Hawaii] . . . is its desire to provide each . . . island . . . with meaningful representation . . . . Based on the unique geographic and economic insularity of the . . . island[s] . . . , along with the state's simplified and centralized . . . government, we find that the . . . policy is . . . rational . . . .")

(footnote omitted). Cf. Morris v. Board of Estimate, 707 F.2d at 691 ("Whether the present allocation of seats . . . is a constitutionally permissible way of blending majority control with minority representation . . . is one issue to be examined on remand.").

Ascertaining at this time whether significant input by the smaller boroughs is a valid concern fostered by the Board may be especially important if the Board is eventually reapportioned, since certain electoral models "assure that sparsely populated areas . . . have a voice in the councils of government." Greenwald v. Board of Supervisors of the County of Sullivan, 567 F. Supp. 200, 203 (S.D.N.Y. 1983) (upholding the constitutionality of an adjusted weighted voting plan) (footnote omitted). See also Baker v. Regional High School District No. 5, 476 F. Supp. 319,

321, 323 (D. Conn. 1979) (In tentatively approving an "ingenious" condition for a three-town board of education preventing majority votes from being carried by the largest town alone or by the two smallest towns together, the court described the total plan as an apparently "conscientious effort to comply with constitutional requirements while providing sufficient checks on majority action . . . ."). See generally Sailors v. Board of Education, 387 U.S. 105, 110-11 (1967) ("Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation.").

But future forms aside, investigating justifications here is to be in accordance with the inquiry outlined in Mahan as lately summarized in Brown:

> "whether the legislature's plan 'may reasonably be said to advance [a] rational state policy' and, if so 'whether the population disparities among the districts that have resulted from the pursuit of this plan exceed constitutional limits.' "

Brown v. Thomson, ___U.S. at ___, 103 U.S. [sic] at 2696 (quoting Mahan v. Howell, 410 U.S. at 328) (brackets by Brown Court).[20]

Finally, the court emphasizes that nothing in the aforesaid is to be construed as a predetermination that the Board does or does not advance specific, valid policies and interests. In that vein, the mentioned areas of inquiry are not by limitation. The number of such putative considerations to be probed is up to the parties as guided by the designated caselaw.

Consistent with the foregoing, the court directs the parties to begin conferring by September 14, 1984. The product of that good faith exchange will be a joint

stipulation for submission no later than October 5, 1984, listing with conciseness and specificity:

> (1) those agreed valid policies and interests presently served by the Board; and
>
> (2) those disputed policies and interests which at least one defendant maintains are valid and are presently served by the Board. For each such disputed consideration, plaintiffs are to explain the basis of their objection.

After reviewing that joint stipulation, the court will schedule a conference with the parties to discuss the subsequent procedure for bringing this litigation to an expeditious and equitable end.

SO ORDERED.

Copies of this Memorandum and Order are being forwarded to counsel for the parties, to the intervenor-defendants, and to the amicus curiae.

_____
U.S.D.J.

Dated: Brooklyn, New York
August 21, 1984

FOOTNOTES

[1] After the Second Circuit's decision, interested others have participated. Citizens Union of the City of New York has submitted an amicus curiae brief urging the Board's unconstitutionality. The Honorable John J. Marchi, representing Staten Island in the New York State Senate, has also tendered an amicus curiae brief but asserting a contrary position. Finally, the Honorable Robert A. Straniere, serving Staten Island's 60th District in the New York State Assembly, has intervened as a defendant maintaining, like Marchi, that the Board is not constitutionally deficient.

[2] That allotment differs on budgetary matters for which the Mayor, who proposes the budget, is without a vote but may veto changes by the Board and City Council acting concurrently. Those bodies, in turn, may override the Mayor. 1 New York City Charter & Ad. Code Ann. §§120-21, 222-23 (Williams Press 1976 & Supp. 1982-83).

[3] A legislative model may be denounced on both grounds. See, e.g., Corder v. Kirksey, 585 F.2d at 709 ("[P]laintiffs contested . . . that the districts did not satisfy the 'one person, one vote' mandate . . . . They also . . . alleged that . . . [the at-large election method] . . . operated to dilute the black vote . . . . [P]laintiffs' case, therefore, sounded in both genres of reapportionment actions: the 'quantitative' (one person, one vote) and the 'qualitative' (dilution).") (footnote omitted).

[4] Besides Pl. for Plaintiffs and Br. for Brief or Memorandum of Law, the following

abbreviations will be used when referring to the submissions: City Def. for City Defendants; I. Def. for Intervenor Defendant; Aff. for Affidavit; App. for Appendix; and Ex. for Exhibit.

[5] The Supreme Court's discussion for State legislatures pertains to local governments, too. See L. Tribe, American Constitutional Law 747 (1978) ("Local apportionment proposals have been judged by standards essentially identical to those applied to states.").

On the other hand, congressional districting -- overseen by the constitution's article I, section 2 as opposed to the equal protection clause for State and local governments -- is held to much stricter standards. See, e.g., White v. Weiser, 412 U.S. 783, 790 (1973) ("The command of Art. I, §2, that representatives be chosen 'by the People of the several States' . . . permit[s] only those population variances among congressional districts that 'are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown.' ") (citation omitted).

[6] Adding the extreme percentage deviations is not complicated by calculating the ideal and the departures therefrom may involve more elaborate computations depending on the electoral scheme. See, e.g., Franklin v. Krause, 344 N.Y.S.2d 885, 887 (1973), appeal dismissed, 415 U.S. 904 (1974) (measuring an adjusted weighted voting system) (discussed infra p. 12).

[7] Followed by a detailed explanation, Ponterio out-lines his methodology as

> "an adaptation of the aggregate method of analyzing floterial districts. In the aggregate method, there is no attempt to divide super-district representation among the sub-districts, proportionately or otherwise. . . . Only an overall population-per-vote ratio is defined, viz., the total super-district population divided by the sum of sub-district and super-district votes."

Id. at 10.

8 Along with the weighting in general, plaintiffs have criticized Ponterio for ignoring the city-wide members' possession of two votes each, since he weights individuals and not the votes the individuals hold. See App. to Pl. Br., Aff of Professor Steven J. Brams at 3 & n. Thus, if Ponterio's methodology augmented Board votes rather than bodies, the result would be a 6-1 city-wide dominance.

Responding to that criticism, Ponterio (by a later submission) has offered a revised version.

> "The modification consists . . . of weighting each city-wide member by the total population of the City, multiplied by 2 (to account for his 2 votes), and divided by 5 . . . ."

January 24, 1984, Aff. of I. Def. Ponterio at 6.

That ministering more aligns Ponterio's methodology with the 6-5 ballot breakdown. It does not, however, cure the more fundamental infirmities in Ponterio's approach. For instance, the inapposite floterial analogy remains as does the most objectionable aspect of his measurement -- the inclusion of the city-wide representation at all in the malapportionment assessment. See infra pp. 21-30.

9 The deviation under Ponterio's altered methodology escalates to 30.66%. See January 24, 1984, Aff. of I. Def. Ponterio at 12 (Table 8).

10 In Andrews, the court's calculus did not consider the City Council President, who -- chosen by the entire City -- was the one truly at-large representative. See infra p. 23. With that seat omitted, the court for clarity referred to the borough-wide representatives as at-large, although only selected by their respective borough electorates.

That designation differentiated them from the district delegates elected mostly from areas within the boroughs. That terminology also comported with the Charter. See, e.g., 1 New York City Charter & Ad. Code Ann. §22(b) (Williams Press 1976 & Supp. 1982-83) ("[T]wo council members shall be elected at-large from each of the boroughs.")

The Board, in contrast, has no district slots from inner-borough areas. Moreover, a distinct borough and city-wide membership distribution exists, which was not the Andrews situation. See infra note 11.

Consequently, the Andrews classifications cannot be followed here. So, as they have been, the Borough presidents will be denominated as either the district or borough representatives, while the Mayor, City Council President and Comptroller will be referred to as either the at-large or city-wide representatives.

[11] Given the similarity between the two cases (quantitative equal protection challenges to New York City governing bodies), another clarifying point should be made regarding Andrews in relation to this suit. There, this court stated that "all Council members, however elected, sit as one body and represent the entire City." Andrews v. Koch, 528 F. Supp. at 250 n.7. That accurately portrayed the City Council's legislative design since its President -- the only city-wide official -- was without significant voting power, as just mentioned. New York City, then, was without a specific block of city-wide advocates. Missing such, the other combined members (forty-five borough and district representatives) were, of necessity, the "one body representing] the entire City." Id.

Decidedly, the Board's structure is different. Distinct city-wide delegates with formidable balloting strength exist. Furthermore, as Mayor, City Council President and Comptroller, their city-wide orientation is preordained by possessing other Charter powers -- the Board seats not being their principal elective offices. See, e.g., 1 New York City Charter & Ad. Code Ann. §§8, 23, 93 (Williams Press 1976 & Supp. 1982-83) (generally describing their respective powers and duties).

Thus, whereas in Andrews all City Council members had to serve both their particular constituencies and the City electorate as a whole due to the quasi-absence of at-large membership, here, the Board does have a substantial at-large block, whose roles are manifestly demarcated from those of the borough members. That being so, the Andrews description of all City Council members "represent[ing] the entire City" cannot by analogy be accurately applied to the Board's members. See generally Dusch v. Davis, 387 U.S. 112, 115-16 (1967) (quoted infra at pp, 24-25); Fortson v. Dorsey, 379 U.S. 433, 438 (1965) (quoted infra at p. 25); Markoe v. Legislature of the Virgin Islands, 592 F.2d at 190 (quoted infra at pp. 25-26).

12 Certainly, at-large plans that are not ideal (i.e., qualitatively contaminated) can impinge on substantial equality. One such system wad described in Perry v. City of Opelousas, 515 F.2d at 641.

> "[T]he all-at-large electoral system has unconstitutionally diluted the voting rights of Opelousas blacks. The long history of racial discrimination, the City's culpable neglect of black interests, Louisiana's anti-single shot and majority vote requirements and the local racially-polarized voting patterns all support the district court's conclusion that these factors, when combined with the white voting majority, have made the multi-member district a certain instrument of dilution."

See also Rogers v. Lodge, 458 U.S. 613, 616 (1982) ("At-large voting schemes and multimember districts tend to minimize the voting strength of minority groups by permitting the political majority to elect all representatives of the district. A distinct minority . . . may be unable to elect any representatives in an at-large election . . . .") (emphasis in original).

Nonetheless, as mentioned, plaintiffs have confined their challenge to a quantitative objection directed only at the disproportionate borough representation, thereby making no allegation that as a consequence of the city-wide delegation, their ballots are devalued. In fact, plaintiffs in the alternative have put forth methodologies attempting to account for the at-large members' supposed mitigating influence on the inequality. See Pl. Br. at 32, 34.

[13] See generally supra note 11.

[14] Establishing the quantitative inoffensiveness of an at-large electoral plan has been material to the court's analysis. In making that point, however, the court has explained that which appears in theory to be uncontested here. See, e.g., Pl. Br. at 30 ("City-wide members represent citizens as citizens of the City, not as residents of particular boroughs."); City Def. Br. at 23 ("By definition, the city-wide members represent the entire City and any attempt to allocate their votes to the borough representatives only results in a gross distortion of the Board's representation scheme."); September 30, 1983, Aff. of I. Def. Ponterio at 3 ("[W]hen a city-wide

member votes, all of the people of the City are represented.") (emphasis in original).

15 By "separately," Professor Brams means, in this case, excluding the at-large. See id. ("Since the citywide members are elected at large, they pose no equal-representation problem. The Borough Presidents, however, are elected from districts with vastly different populations, and it is their citizens who are denied equal representation . . . .").

Also, in line with his general position, Professor Brams disavows any of plaintiffs' methodologies factoring in the alleged salutary consequences of the city-wide representation on the inter-borough disproportions. See id. ("To the extent that Plaintiffs have proposed models which . . . [allocate the citywide . . . votes] . . . . , I disagree with them.").

16 In this case, for instance, if the city-wide members were not eliminated, the chosen methodology would have to account for their two votes each to the borough members' one each. Also, the deviation for budgetary matters where the Board is mayorless would have to be separately computed. See supra p. 5 & note 2. Excluding the city-wide precludes those complications.

17 See supra note 5.

18 Ponterio, on the defendants' side, has advanced the Board's effectiveness as a consideration. See September 30, 1983, Br. of I. Def. Ponterio at 28 ("[T]he Board's] effectiveness in providing for the health,

welfare, safety, morals, public convenience, and general prosperity is an overriding police-power concern . . . .").

While not acknowledging effectiveness, in general, as a valid consideration, Richard Emery, plaintiffs' counsel, has admitted that the Board does further that interest. See June 6, 1982, Hearing Transcript at 53 ("[T]hough the Board . . . may work very well and may be very efficient and I concede that . . . it nevertheless is an undemocratic institution . . . .").

19 Straniere, for the defense, has put forth meaningful participation by Staten Island in Board business as a valid justification. See Br. for I. Def. Straniere at 22 ("[R]eapportioning the Borough Presidents' votes based strictly on population figures would completely silence the small but equal voice brought to the Board's discussions by Staten Island's Borough President and would directly contradict a legitimate state policy . . . followed for over eighty-two years.").

In fact, regarding that asserted consideration, an exhibit tendered by plaintiffs has forecast the ramifications for Staten Island if reapportionment proceeds strictly on a population basis. See Kramarsky Aff. and Ex.: "The Kramarsky Study" at 116-17 ("[K]eeping control of the Board with its city-wide members and reapportioning the Borough Presidents' votes according to population would reduce the Borough President of Staten Island to the status of an observer in the Board's deliberations.").

[20] Since plaintiffs have conceded the Board's effectiveness (i.e., it furthers effectiveness), the only issue on that interest will be whether that consideration, indeed, is a valid one. See supra note 18.

DECISION OF THE UNITED STATES
COURT OF APPEALS
FOR THE SECOND CIRCUIT
Dated May 16, 1983
Docket No. 83-7007

BEVERLY MORRIS, JOY CLARKE HOLMES, JOANNE OPLUSTIL,

Plaintiffs-Appellants,

-against-

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of the City of New York, CAROL BELLAMY, individually and as City Council president, HARRISON J. GOLDIN, individually and as Comptroller for the City of New York, HOWARD GOLDEN, ANDREW STEIN, STANLEY SIMON, DONALD MANES, ANTHONY GAETA, each individually and as Borough presidents of the boroughs of the City of New York,

Defendants-Appellees,

and

FRANK V. PONTERIO,

Intervenor-Defendant-Appellee.

Before: KAUFMAN and NEWMAN, Circuit Judges and LASKER, District

Judge.*

Appeal from a judgment of the United States District Court for the Eastern District of New York (Neaher, Judge), holding the one person, one vote principle of the Equal Protection Clause of the Fourteenth Amendment inapplicable to the New York City Board of Estimate.

Reversed and remanded.

Richard Emery, New York, N.Y. (Arthur Eisenberg, New York Civil Liberties Union, New York, N.Y., on the brief), for Plaintiffs-Appellants.

Judith A. Levitt, New York, N.Y. (Frederick A. O. Schwarz, Jr., Corp. Counsel, Leonard Koerner, Susan D. Rosenberg, New York, N.Y., on the brief), for Defendants-Appellees.

Frank V. Pontiero, Staten Island, N.Y., for Intervenor-Defendant-Appellee, pro se

*Hon. Morris E. Lasker of the United States District Court for the Southern District of New York, sitting by designation.

Alan Rothstein, New York, N.Y,
for Amicus Curiae Citizens Union
of the City of New York.

This appeal presents the question whether the equal protection principle of one person, one vote is applicable to the election of members of the New York City Board of Estimate.

The Board of Estimate ("the Board") is one of the governing bodies of New York City. It exercises a wide range of powers, including the power to negotiate and enter all contracts on behalf of the city; to approve or modify all zoning decisions for the city; to set tax abatements; and to determine the use and development of all property owned by the city. In addition, in conjunction with the City Council, the Board recommends and approves the city's expense and capital budgets.[1]

The Board has eight members. Three of the members, the Mayor, the Comptroller and the President of the City Council, are elected by the votes of the entire city

electorate. The other members are the Borough Presidents of New York City's five boroughs: the Bronx, Brooklyn, Manhattan, Queens and Richmond (Staten Island). The Borough Presidents are elected only by the voters of their respective boroughs.

The boroughs of New York vary greatly in population. According to the 1980 census, Brooklyn, the largest, had a population of approximately 2.2 million, while the population of Staten Island, the smallest, was slightly over 350,000. Appellants claim that the system by which voters of geographical units of substantially different populations send the same number of representatives to the Board violates the Equal Protection Clause of the Fourteenth Amendment. Appellants, residents and voters of Brooklyn, contend that as a result of the present voting scheme, voters in

Staten Island have six times the voting strength of Brooklyn voters.

In the district court, the principal parties cross-moved for summary judgment on agreed facts. Summary judgment was opposed by Frank Ponterio, a resident and voter of Staten Island, who had been permitted to intervene. The court granted appellees' motion for summary judgment, concluding that the Board is neither an elective nor a legislative body, and that, accordingly, under Avery v. Midland County, 390 U.S. 474 (1968), and Sailors v. Board of Education, 387 U.S. 105 (1967), the constitutional principle of one person, one vote was inapplicable.

The district court determined that the Board is not an elective body because no independent election is held to select the Board's members; rather, the Board "consists of a group of public officials who

are already constitutionally elected to their respective offices as required by law." In addition, the district court, in reliance on Sailors v. Board of Education, supra, determined that the Board's primarily non-legislative character removed it from the reach of the Equal Protection Clause.

Appellants challenge the district court's conclusion that the Board is not an elected body, arguing that because the members of the Board become Board members as a matter of law upon election, they are in fact and law "elected" to their respective positions. They further contend that the proper question is not whether the Board executes legislative tasks, but whether it exercises general governmental functions. Finally, appellants argue that the voting disparities created by the present electoral scheme are far greater than permissible under the Equal Protection Clause and such cases as Abate

v. Mundt, 403 U.S. 182 (1971) and Mahan v. Howell, 410 U.S. 315 (1973).

Appellees contend that the Board members sit on the Board "ex officio" and accordingly are not elected to the Board itself. They argue further that this Court should defer to the decision of the New York Court of Appeals in Bergerman v. Lindsay, 25 N.Y.2d 405, 306 N.Y.S.2d 898 (1969), appeal dismissed and cert. denied, 398 U.S. 955 (1970), which upheld the constitutionality of the Board's electoral scheme as it was at the time. Finally, appellees urge that the unique nature of the Board presents the type of "special circumstances" that the Supreme Court has indicated may justify "departures from strict equality" of the one person, one vote rule under Abate v. Mundt, 403 U.S. 182 (1971).

Intervenor-Appellee Ponterio defends the district court's grant of summary

judgment and further contends that if the one person, one vote rule applies to the Board, substantial questions of fact are presented as to whether the present scheme in fact results in disproportionate voting power as between voters of different boroughs, and, if so, to what extent.

I.

In Hadley v. Junior College District, 397 U.S. 50, 56 (1970), the Supreme Court held "that as a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election ..." Accordingly, our primary task is to determine whether the Board of Estimate is selected "by popular election"

and whether it performs "governmental functions."

In finding the Board to be an appointed body, the district court relied primarily on Sailors v. Board of Education, 387 U.S. 105 (1967), in which the Supreme Court held the one person, one vote standard inapplicable to a county school board which was selected by a process described as "basically appointive rather than elective." Id. at 109. In Sailors, voters in local districts elected local school boards. Each local board then sent a delegate to a biennial meeting at which the county board was elected. As the Court explained: "there is not even a formal method by which a delegate [from a local school board] can determine the preferences of the people in his district. It is evident, therefore, that the membership of the county board is not determined, directly or indirectly, through an election in which

the residents of the county participate." Id. at 110 n.6.

Unlike the county school board members in Sailors, the members of the Board of Estimate are directly elected by the voters. Upon election to their respective positions, they automatically become Board members as a matter of law. Section 61 of the City Charter specifies:

> "The mayor, the comptroller, the president of the council and the presidents of the boroughs shall constitute the board of estimate."

(emphasis added)

It follows that the Board of Estimate is not an appointed body; its membership is definitively determined by election and by election alone.

Moreover, the question of the applicability of the Equal Protection Clause to "ex officio" boards was settled in this Circuit in Bianchi v. Griffing, 393 F.2d 457

(2d Cir. 1968). In Bianchi, we held the one person, one vote principle applicable to a county board of supervisors selected in a manner virtually indistinguishable from the process by which the Board of Estimate is chosen. The board at issue in Bianchi consisted of elected town supervisors who served on the county board as "delegates" of their towns. The language used in rejecting the appellee's argument in Bianchi describes the situation presented here:

> "The mere fact that board members may be characterized as 'delegates' and perform functions in addition to their duties on the board, does not provide a meaningful distinction ... We are impelled to the realistic recognition that a citizen entering the voting booth chooses at one and the same time a member of the Board of Supervisors and his town supervisor."

Id. at 461. Similarly, a citizen entering the voting both in New York City "chooses at one and the same time" his Borough

President and his Board of Estimate member. See also Rosenthal v. Board of Education, 497 F.2d 726, 729 (2d Cir. 1974) ("Had election as a member of a local board served automatically to designate that elected member also as a member of a central high school board, the 'one man, one vote' concept would have been offended") (emphasis added).

Accordingly, we conclude that the Board of Estimate is selected by popular election.

II

The question whether the Board of Estimate exercises "general" governmental functions which have "sufficient impact throughout the district," Hadley, supra, at 54, is answered by a review of the Board's duties. The Board, acting alone, must approve every lease, every franchise, and, indeed, every contract entered by the city

of New York. It sets tax abatements, approves and modifies all zoning decisions, and determines the use, development and improvement of property owned by the city. In view of these powers, as well as the Board's substantial role in passing on the city's budget, it appears beyond dispute that the Board exercises extensive control over the land and resources of New York City.

Whether the Board's role is more "administrative" than "legislative" is not controlling: while the distinction was at one time considered significant by the courts, and indeed was a focal point of the New York Court of Appeals decision upholding the validity of the Board of Estimate in Bergerman v. Lindsay, supra,[2] it was conclusively abandoned by the Supreme Court in Hadley:

> "It has also been urged that we distinguish for apportionment purposes between elections for 'legislative' officials and those for 'administrative' officers. Such a suggestion would leave courts with an equally unmanageable principle since governmental activities 'cannot easily be classified in the neat categories favored by civics texts, Avery [v. Midland County, 390 U.S. 474, 482 (1968))]'"

Id. at 55-6.

Accordingly, we conclude that the Board of Estimate is selected by popular election and performs general governmental functions. The principle of one person, one vote is therefore applicable.

III.

Because the district court found the one person, one vote rule inapplicable, no findings were made concerning the level of malapportionment, the weight of the state interests alleged to justify whatever level of deviation exists or whether the combination of at-large and local seats, in the context of the voting procedures of the Board, creates

a system of representation that satisfies constitutional standards for instruments of local government. It is therefore proper to remand the case to the district court so that it can make such findings.

Upon remand, the district court must determine the degree of malapportionment present (after deciding on the appropriate methodology for doing so)[3] and rule on the policies and interests which the Supreme Court has held may justify deviations from the literal one person, one vote formula.

"Mathematical exactness or precision is hardly a workable constitutional requirement," Reynolds v. Sims, 377 U.S. 533, 577 (1964), and this is "particularly true for state and local bodies, where more flexibility is constitutionally permissible due to the interest in the normal functioning of these institutions," Baker v. Regional High School District No. 5, 476 F. Supp. 319, 323

(D. Conn. 1979). The district court may find it desirable to amplify the record with regard to "the particular circumstances and needs of [the] local community as a whole [which] may sometimes justify departures from strict equality." Abate v. Mundt, 403 U.S. 182, 185 (1971).

Two brief comments as to arguments of intervenor-appellee Ponterio are in order. First, Ponterio attempts to demonstrate statistically that even if the votes of Brooklynites are diluted under the present arrangement, the Board's structure and composition is such that it cannot be controlled by representatives of a minority of the population. That point, however, worthwhile, is not dispositive: a plaintiff in a malapportionment case is not required to prove that the challenged body is controlled by representatives of a minority of the population. The question is not whether

Staten Island "dominates" the Board of Estimate, but whether "the guarantee of equal voting strength for each voter [which] applies in all elections of governmental officials," Hadley, supra, at 58, is violated by the present electoral scheme.

Second, Ponterio purports to prove that under a proportional voting scheme adjusted to equalize the disparities complained of by appellants, Staten Island's voters would be "effectively disenfranchised" because Staten Island's vote would rarely be decisive. As an initial matter, we question whether such a proposition is capable of being proven in a reliable manner: whether a minority representative is "effectively disenfranchised" or whether it becomes the "kingmaker" that regularly breaks ties between the major coalitions depends on which coalitions most often occur in practice, a matter which appears unpredictable except

perhaps for the short run. However, questions of proof are for the district court. More importantly, the fact that a minority may regularly be overshadowed by its more populous neighbors under a proportional voting scheme is one characteristic of a representative democracy. Whether the present allocation of seats on the Board is a constitutionally permissible way of blending majority control with minority representation and other legitimate needs of local government is one issue to be examined on remand.

Nothing said above is intended to indicate a view as to the proper or preferable means of constituting the Board or whether it is presently properly constituted. In connection with the present structure of the Board it is important to recognize that the Supreme Court has repeatedly endorsed innovative approaches to

local government, devised by local officials to meet local needs. "[T]he Constitution and this Court are not roadblocks in the path of innovation, experiment, and development among units of local government," Avery v. Midland County, 390 U.S. 474, 485 (1968). So long as the requirements of the Equal Protection Clause are met, each locality is free to develop the system of governance which best accords with its needs.

For the reasons stated above, the decision of the district court is reversed and remanded.

FOOTNOTES

[1] The powers of the Board are set forth in the New York City Charter, see especially §§ 67, 120, 121, 200, 202, 222, 223, 224, 229, 230, 343, 362, 363, 372, 384; the New York City Administrative Code; and sundry provisions of State law, see e.g., N.Y. Gen. Mun. Law § 126 (McKinney 1977).

[2] The New York Court of Appeals held that the one person, one vote rule was not applicable to the Board of Estimate because the Board exercised neither legislative nor general governmental powers. Bergerman v. Lindsay, 25 N.Y.2d 405, 306 N.Y.S.2d 898 (1969), appeal dismissed and cert. denied, 398 U.S. 955 (1970). However, the Bergerman case was decided without the benefit of the Supreme Court's ruling in Hadley, supra, decided shortly thereafter, which we believe dictates a different result. Moreover, subsequent to the Bergerman

decision, the law governing the Board's voting rules was altered by the 1975 New York City Charter Amendments to eliminate the Mayor's votes in the budget adoption process so that today it is theoretically possible for the votes of Board members representing a minority of the population to control the outcome on budget matters.

[3] For example, the fact that three members of the Board are elected at large from the entire city raises novel issues as to how an individual voter's opportunity to elect these members should be assessed in conjunction with his opportunity to elect his borough representative.

MEMORANDUM AND ORDER OF THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NEW YORK
Dated December 1, 1982
81 CV 3920 (ERN)

BEVERLY MORRIS, JOY CLARKE HOLMES, JOANNE OPLUSTIL,

Plaintiffs,

-against-

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of the City of New York, CAROL BELLAMY, individually and as City Council president, HARRISON J. GOLDIN, individually and as Comptroller for the City of New York, HOWARD GOLDEN, ANDREW STEIN, STANLEY SIMON, DONALD MANES, ANTHONY GAETA, each individually and as Borough presidents of the boroughs of the City of New York,

Defendants,

and

FRANK V. PONTERIO,

Intervenor-Defendant.

APPEARANCES:

RICHARD EMERY, ESQ.
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By JUDITH A. LEVITT, ESQ.
SUSAN R. ROSENBERG, ESQ.

FRANK V. PONTERIO, ESQ.
Intervenor-Defendant Pro Se

NEAHER, District Judge.

This action raises again the question of the application of the "one person, one vote" principle of the Fourteenth Amendment to an agency of local government.[1] Plaintiffs are three registered voters of the Borough of Brooklyn who seek declaratory and injunctive relief to remedy claimed disproportionate representation of their borough on the Board of Estimate of the City of New York. This Court's jurisdiction over the action is not in controversy; indeed, the defendants join plaintiffs in seeking a disposition by summary judgment on the basis of an agreed

statement of facts not in dispute, and both sides have served motions accordingly.

The defendants in the action are the City of New York, the Board of Estimate (hereinafter "Board") and its eight constituent members, namely, the Mayor, the Comptroller the President of the City Council and the five Borough presidents.[2] These officials are not elected to the Board. Rather, they function as members of the Board by virtue of their prior election to the City governmental offices they hold. Essentially, the controversy between the parties focuses solely upon the allocation of one vote to each of the five borough presidents for purposes of deciding matters over which the Board has jurisdiction. Plaintiffs contend in general that such an equal distribution of voting power is an unconstitutional dilution of the voting rights of Brooklyn residents who substantially

outnumber the populations of the four other boroughs, especially the considerably less populous Borough of Richmond (Staten Island). Defendants, however, raise a more fundamental question: whether the Board, as a unique instrumentality of local government, is subject to the "one person, one vote" rule. For the reasons hereinafter discussed, we hold that it is not and thus the "one person, one vote" rule has no relevance to the Board's functions.

The following relevant facts are not in dispute. The Board is an agency[3] of New York City municipal government authorized by Chapter 3 of the New York City Charter. The current City Charter, except as amended in 1975, became effective January 1, 1963 following approval by the City's voters. The Board, however, has had a long and varied history dating back to 1864, when it was originally created for the

purpose of estimating the expense of conducting a metropolitan police district for the then separate cities of New York and Brooklyn. Its original members were the Commissioners of the Metropolitan Police (appointed by the Governor) and the Comptrollers of New York and Brooklyn (chosen by the respective Common Councils of those cities).[4]

As already indicated, the Board of Estimate is now comprised of three city-wide officials, i.e., the mayor, the comptroller, the city council president and the five borough presidents. Ch. §61[5] The city-wide officials are, of course, elected to their respective offices by majority vote of the City's entire voting electorate. Each borough president is elected only by the voters residing in his borough and is allotted one vote on the Board. The city-wide officials on the Board have two

votes each for a total of six, which constitutes a majority except when the mayor's two votes are eliminated in the budget formulation and adoption process. Ch. §62.

To carry out its responsibilities, the Board is required to meet at least once every other week except during July and August. Ch. §63. The mayor, or in his absence the president of the city council, presides at all meetings. Id.[6] Unless otherwise provided in the Charter or by law, the Board must act by resolution adopted by a majority of the eleven votes authorized to be cast by all its members, except that a three-fourths vote is required to adopt a resolution or amendment thereof which is originally presented at a Board meeting. Moreover, such a resolution or amendment may not be finally passed except at a meeting open to the public. Ch. §62b, c.

By unanimous vote the Board may delegate to any member or committee the power to act or hold hearings on any matter within its jurisdiction, excluding, however, matters included in the formulation and adoption of the expense and capital budgets, city planning and the granting of franchises as set forth in Chapters 6, 8, 9 and 14 of the Charter. Ch.§65.

The responsibilities, powers and duties of the Board are set forth in the Charter, the New York City Administrative Code and sundry provisions of State law. Section 67 of the Charter provides that:

> "The board shall exercise the powers and perform the duties imposed upon it by this charter, and shall:
>
> "1. Grant leases of city property and concessions for the use of city property and enter into leases of property to the city for city use.
>
> "2. Make recommendations to the mayor or the council in regard

to matters of city policy whenever requested or on its own initiative.

"3. Hold public hearings on any such matter of city policy or other matters within the scope of its responsibilities whenever requested by the mayor or required to do so by this charter or other provisions of law or whenever in its judgment the public interest will be benefited thereby.

"4. Have final authority respecting the use, development and improvement of city land.

"5. Have authority to approve standards, scopes and final designs of capital projects.

"6. Have power to supersede a community board or withdraw from a community board delegated powers of such community board for violation of law, malfeasance or misfeasance by three-quarters vote after notice to members of the community board and a public hearing.

"7. Hold a hearing on tax abatement applications relating to the development of city land where the granting of such applications involves the exercise of administrative discretion by any city agency."

In addition Charter chapters 6 and 9 provide a concurrent role for the Board with

that of the city council and the mayor in the formulation and adoption of the City's annual expense and capital projects budgets. It is these provisions which are the core of plaintiffs' claims that the Board is "one house of a bicameral legislature" in which Board members representing only 41.7% of the City's population may "control a majority of votes on every budget measure." Complaint, pars. 8B, 16. Those claims, however, cannot withstand a fair analysis of a City budgetary procedure which is clearly designed to insure that all the City's elected officials, officers of City agencies and representatives of community and borough boards representing all sectors of the City have the opportunity to be heard before an expense or capital budget is finally adopted. Ch. §§119, 221.

It is the mayor, as the City's chief executive officer, Ch. §3, acting through his

appointed director of management and budget, Ch. §111, who initially shapes and proposes the expense budget based upon his views of the City's needs and priorities in light of its revenue resources. Ch. §§112-117. The Board acting jointly with the city council may not reject the proposed budget in toto; but "may increase, decrease, add or omit any unit of appropriation . . . or add, omit or change any terms or conditions of it." Ch. §120. And if the Board and city council cannot agree by June 5th of any year, "the budget and tax rate adopted as modified for the current fiscal year shall be . . . extended for the new fiscal year until such time as a new budget is adopted." Ch.§120c.

Moreover, although the mayor may not vote as a member of the Board when it and the city council are considering his proposed budget, he has the power to veto any

changes they make. Ch. §121. In that event, either the Board by two-thirds vote of all members other than the mayor, or the city-council by two-thirds vote of all its members must act to override his disapproval of any change. If the Board does so, it must be supported by majority vote of all city council members; if the city council acts first, the Board must concur by majority vote without the mayor's two votes. Ch. §121b. Also, during any fiscal year the mayor may transfer one unit of budget appropriation to another without notice to the Board or the city council. Only when a transfer is from one agency to another, or results in a unit of appropriation being increased or decreased by more than 5%, must notice be given to the Board and the city council.[7] Either body may disapprove the proposed action within 30 days. Ch. §124b. The New York Court of Appeals has

held that in such event the mayor may vote as a member of the Board. Golden v. Koch, 49 N.Y.2d 690 (1980).

The formulation and adoption of the City's capital projects budget follows a parallel course, except that the city planning commission, also appointed by the mayor, Ch. §§191-192, advises and assists him, the Board and the city council in planning capital project undertakings. Also the comptroller provides information as to the maximum amount of debt and reserves the City may soundly incur for capital projects and debt financing during the ensuing four fiscal years. Ch. §212. Again both the Board and the city council must agree on any changes to be made in the mayor's proposed executive capital budget; and, if the mayor vetoes such changes, must unite to override any disapproval in the same

manner as provided for the expense budget. Ch. §223c.

It can readily be seen from the foregoing Charter provisions that the borough presidents on the Board cannot control the City's budgetary process, as plaintiffs contend. First, the Board alone cannot adopt a budget; the city council's separate concurrent vote is required. Ch. §120b. Second, the Board cannot initiate an override of a mayor's veto except by a two-thirds vote excluding the mayor's vote. Ch. §121b. That would require six votes out of nine, which means that the support of the comptroller or the city council president, or both, is essential. Only if the city council initiated an override by two-thirds vote of its members is it possible for the Board to concur by a majority of five votes. And if the two bodies fail to agree, the expense budget as modified by the mayor is

adopted. Id. As already indicated, parallel provisions apply with similar effect in the case of the capital projects budget. Ch. §§222, 223.

The critical flaw in plaintiffs' argument is their misconception of the ruling and principles enunciated in Avery v. Midland County, 390 U.S. 474 (1968), on which they heavily rely. The question before the Court in that case was "whether the Fourteenth Amendment likewise forbids the election of local government officials from districts of disparate population." Id. at 478, emphasis supplied. Answering that question in the affirmative, the Court stated the underlying principle that "the Constitution permits no substantial variation from equal population in drawing districts for units of local government having general governmental powers over the entire geographic area served by the body." Id. at 485. The

Commissioners Court of Midland County in Avery was in fact the County's elected governing body whose members represented districts of widely disparate population, except for the county judge, who was elected at large. The Board, however, is not an elected body: it consists of a group of public officials who are already constitutionally elected to their respective offices as required by law. Ch. §4 (election of mayor); Ch. §81 (election of borough presidents); Ch. §91 (election of comptroller). No provision is made in the Charter for the election of a board of estimate. Membership and participation in the assigned activities of the Board is simply a part of the prescribed duties of the respective offices to which the designated officials were already elected. Ch. §§61-68. The members of the Board are, in effect, appointed by local law.

Prior to its decision in Avery, supra, the Supreme Court had already found no reason why local government officials of a "nonlegislative character" could not be chosen by "some other appointive means rather than by election." Sailors v. Board of Education, 387 U.S. 105, 108 (1967). In Sailors, the Court rejected a constitutional challenge to the biennial selection of county school board members by delegates chosen by local school boards whose members had been elected by the people. Noting again that "[w]e see nothing in the constitution to prevent experimentation," the Court held that "[s]ince the choice of members of the county school board did not involve an election and since none was required for these non-legislative offices, the principle of 'one man, one vote' has no relevancy." Id. at 111.

Plaintiffs seek to clothe the Board with a legislative character by contending that it "maintains legislative functions which are implemented on a day-to-day basis," while conceding that it is not "formally denominated a city legislature." Pl. Mem. at 10. The Charter makes it clear, however, that it is the city council which is "vested with the legislative power of the city, and shall be the local legislative body of the city." Ch. §21. It is the city council elected by the voters, not the Board, which is charged with the responsibility of enacting the local laws that govern the City. Ch. §27. Noteworthy also is the provision that the city council president -- a member of the Board -- has no vote in council deliberations except to break a tie. Ch. §23d. Moreover, as previously pointed out, to the extent that the Board has a role with the city council in the budget-making process

which may be regarded as legislative in nature, the Board's powers "are at once closely conditioned and highly contingent on the action of other city agencies, executive and legislative. The Board is itself unable alone to make or revoke a budget with finality or to add or delete an item in a budget beyond the reach of further change by others." Bergerman v. Lindsay, 25 N.Y.2d 405, 409 (1969). The subsequent elimination in 1975 of the mayor's votes on the Board in the budget formulation and adoption process clearly does not undermine the Bergerman Court's findings or permit representatives of a minority of the City's population to adopt a budget, as plaintiffs contend. Pl. Mem. 10, 35.

To conclude, plaintiffs' attempt to draw an analogy between the Board and the local governing bodies before the Court in Avery, supra, in Hadley v. Junior College District,

397 U.S. 50 (1970), and in Abate v. Mundt, 403 U.S. 182 (1971), ignores the critical element in each case, namely, the malapportionment of an elected governing body. That is not the case here, since the Board per se is not an elected body.

As the New York Court of Appeals has pointed out, "the chartered plan of government for the City of New York has but two branches -- executive and legislative -- the functions of which, as defined by the legislature, are not always independent. This comes about . . . from the fact that a city is not sovereign, as are the federal government and the States," but is simply an agency of the State. LaGuardia v. Smith, 288 N.Y. 1, 7 (1942). The mayor, as the chief executive officer of the City, in addition to his power to appoint and remove all city officials not elected by the people, exercises "all the powers vested in the city,

except as otherwise provided by law." Ch. §§3, 6, 8. The city council, as already noted, is "vested with the legislative power of the city . . . ." Ch. §21. The role and power of a borough president, on the other hand, is considerably more limited. Aside from appointing or removing a deputy, an executive assistant and subordinate employees, a borough president is limited to maintaining a topographical bureau, chairing a borough board, holding public hearings on matters of public interest, and making recommendations to the mayor and other city officials on capital projects and in the interest of the people of his borough. Ch. §§82, 85.

Where then does the Board fit into City government? It is in large measure, to quote the Kramarsky Report, supra,

> "a forum in which the most powerful elected officials representing different parts of the

> city can meet and represent the interests of their particular groups, as well as the City as a whole . . . . Id. at p. 5.

But the Board is more than a forum, for as the same report shows, the Board performs a wide variety of executive and administrative functions in respect of the use of property of, or for the City; the authorization and/or approval of public improvements; the disposal of City property; city planning and zoning; contracts and franchises; budgetary and financial matters; and a miscellany of minor matters. Kramarsky Report, Appendix A, at 122 et seq. None of these, however, is legislative in nature except for the Board's limited role in the annual budget process, which cannot be decisive without the concurrent support of the city council. More important, if there were no Board, these functions would very likely have to be performed by the same

elected officials who constitute the Board, and who indeed now make its decisions.

Since in our view the Board does not fall within the purview of the "one person, one vote" rule, plaintiffs' motion for summary judgment must be denied and defendants' motion granted.

SO ORDERED.

The Clerk of Court is directed to enter judgment dismissing the complaint. The Clerk is further directed to forward copies of this Memorandum and Order to counsel for the parties.

_____
U.S.D.J.

Dated: Brooklyn, New York
December 1, 1982

RELEVANT PROVISIONS OF THE NEW YORK CITY CHARTER PERTAINING TO THE POWERS AND DUTIES OF THE N.Y.C. BOARD OF ESTIMATE

Section 67. **Responsibilities of the board.** The board shall exercise the powers and perform the duties imposed upon it by this charter, and shall:

1. Grant leases of city property and concessions for the use of city property and enter into leases of property to the city for city use.

2. Make recommendations to the mayor or the council in regard to matters of city policy whenever requested or on its own initiative.

3. Hold public hearings on any such matter of city policy or other matters within the scope of its responsibilities whenever requested by the mayor or required to do so by this charter or other provision of law or whenever in its judgment the public interest will be benefited thereby.

4. Have final authority respecting the use, development and improvement of city land.

5. Have authority to approve standards, scopes and final designs of capital projects.

6. Have power to supersede a community board or withdraw from a community board delegated powers of such community board for violation of law, malfeasance or misfeasance by three-quarters vote after notice to members of the community board and a public hearing.

7. Hold a hearing on tax abatement applications relating to the development of city land where the granting of such applications involves the exercise of administrative discretion by any city agency.

Section 116. **Submission of the budget.** Not later than the twenty-sixth day of April the mayor simultaneously shall submit to the board of estimate and the council (1) a proposed budget for the ensuing fiscal year, and (2) a budget message, both of which shall be public records and shall be printed forthwith.

Section 119. **Budget hearings.** Between the sixth day of May and the twenty-fifth day of May in each year, the board of estimate and the council shall hold public hearings on the budget as presented by the mayor. The council may hold such hearing either as a body or by its finance committee or other committees. The hearings may be held jointly by consent of both bodies. Officers of agencies and representatives of community boards and borough boards shall have the right, and it shall be their duty when requested by the board of estimate or the council, to appear and be heard.

Section 120. **The budget; approval.**

a. The board of estimate and the council may increase, decrease, add or omit any unit of appropriation in the budget as submitted by the mayor, or add, omit or change any terms or conditions of it.

b. Except as otherwise provided by law, and subject to the veto of the mayor pursuant to section one hundred twenty-one, the board of estimate and the council, by separate concurrent vote of each body, shall adopt a single budget, and it shall be returned to the mayor not later than the fifth day of June. In the event of a disagreement between the two bodies, each shall appoint members to a conference committee to reconcile differences and to make recommendations to the respective bodies for concurrent vote of each body.

c. If a single budget has not been adopted by the fifth day of June pursuant to subdivision b of this section, the budget and tax rate adopted as modified for the current fiscal year shall be deemed to have been extended for the new fiscal year until such time as a new budget is adopted.

d. The mayor shall not participate in any action or vote of the board of estimate on the budget.

e. The actions and votes of the board of estimate and the council shall be certified to the mayor by the secretary of the board of estimate and the president of the council, respectively.

Section 121. **Veto of the mayor.**

a. The mayor, not later than the tenth day of June, may disapprove any increase or addition to the budget any unit of appropriation, or any change in any term or condition of the budget. The mayor shall return the budget by that date to the board of estimate and council, setting forth his objections in writing.

b. Either the board of estimate by a two-thirds vote of all the members of the board other than the mayor, or the council, by a two-thirds vote of all the council members, may override any disapproval by the mayor pursuant to subdivision a of this section, with the concurrence of the other body by a majority vote of all members other than the mayor in the case of the board of estimate. The board of estimate and the council shall act and the expense budget shall be adopted not later than the twentieth day of June. In the event the board of estimate and the council fail to act by that date, the expense budget as modified by the disapprovals by the mayor is adopted.

Section 124. **Budget modification.**

a. Subject to the quarterly spending allotments and aggregate position and salary limits

established pursuant to section one hundred twenty-three, and to other applicable provisions of this charter, of the civil service law and of other law, changes in schedules, within units of appropriation, may be made by the head of each agency. Any such changes shall be published in the City Record and copies shall be forwarded to the mayor and the comptroller not less than ten days before the effective date thereof.

b. The mayor during any fiscal year may transfer part or all of any unit of appropriation to another unit of appropriation, except that when any such transfer (1) shall be from one agency to another or (2) shall result in any unit of appropriation having been increased or decreased by more than five per cent from the budget as adopted for such unit of appropriation, the mayor shall notify the board of estimate and the council of the proposed action. Within thirty days after the first stated meeting of each body following the receipt of such notice, either the board of estimate or the council may disapprove the proposed action. Written notice of any transfer pursuant to this subdivision shall be given to the comptroller and shall be published in the City Record as soon as possible after such transfer.

c. The provisions of this section shall not be deemed to authorize any transfer from appropriations required by law.

d. As used in this section, the term "unit of appropriation" shall mean and include (1) a unit of appropriation for personal service as defined in subdivision b of section one hundred twelve of the charter together with that portion of a unit of appropriation for other than personal service, as defined in subdivision c of such section one hundred twelve, which is allocated to such unit of appropriation for personal service; or (2) a unit of appropriation for other than personal service as defined in subdivision c of such section one hundred twelve.

e. The council may during any fiscal year transfer part or all of any unit of appropriation within the council appropriation to any other council unit of appropriation for any of its programs or projects or for any other purpose, solely by adoption of a council resolution. Each such transfer shall be published in the City Record and written notice thereof shall be given to the mayor and to the comptroller not less than ten days before the effective date thereof.

f. The procedures and required approvals pursuant to sections one hundred twenty, one hundred twenty-one and one hundred twenty-two, without regard to the dates specified therein, shall be followed in the case of (1) any proposed amendment to the budget respecting the creation of new units of appropriation, or (2) the appropriation of new revenues from any source, or (3) the proposed use by the city of previously unappropriated funds received from any source. Any request by the mayor respecting an amendment to the budget that involves an increase in the budget shall be accompanied by a statement of the source of current revenues or other identifiable and currently available funds required for the payment of such additional amounts.

Section 219. **Executive capital budget.**

a. Not later than the twenty-sixth day of April in each year, the mayor shall submit to the board of estimate and to the council with an explanatory message, a proposed executive capital budget for the ensuing fiscal year, the aggregate amount of which shall not exceed the amount in the mayor's certificate, and a proposed executive capital program for the three succeeding fiscal years.

. . .

Section 220. Recommendations of comptroller and city planning commission. Not later than the

sixth day of May, the comptroller and the city planning commission shall submit to the board of estimate and to the council reports, which shall be published forthwith in the City Record, containing such comments and recommendations with respect to the proposed executive capital budget and capital program as they may deem advisable.

Section 221. **Executive capital budget; hearings.** Between the sixth day of May and the twenty-fifth day of May in each year, the board of estimate and the council shall hold public hearings on the proposed executive capital budget and executive capital program. The council may hold hearings as a body or by its finance committee or other committees. Such hearings may be held jointly by consent of both bodies. Officers of agencies and representatives of community boards and borough boards shall have the right, and it shall be their duty when requested by the board of estimate or the council, to appear and be heard.

Section 222. **Capital budget; adoption.**

a. The board of estimate and the council, by separate concurrent vote of each body, may increase, decrease or omit the amount of the appropriation for any capital project in the proposed executive capital budget or executive capital program, or add any new capital project to such proposed budget or program or add, omit, or change any term or condition of such proposed budget or program. Except as otherwise provided by law, and subject to the veto of the mayor pursuant to section two hundred twenty-three, the board of estimate and the council, by separate concurrent vote of each body, shall adopt a single capital budget and a single capital program, and they shall be returned to the mayor not later than the fifth day of June. In the event of a disagreement between

the two bodies, each shall appoint members to a conference committee to reconcile differences and make recommendations to the respective bodies.

b. If a single capital budget and a single capital program have not been adopted by the fifth day of June pursuant to subdivision a of this section, they shall be deemed adopted so far as acted on by both bodies with the lower amount of any item in dispute between the two bodies in effect.

c. The mayor shall not participate in any action or vote of the board of estimate on the executive capital budget or in any action or vote on the executive capital program.

Section 223. **Veto of the mayor.**

a. Any action by the council on a capital project or on the terms and conditions of the capital budget shall be certified to the mayor by the president of the council. Any action by the board of estimate on a capital project or on the terms and conditions of the capital budget shall be certified to the mayor by the secretary of the board of estimate.

b. The mayor, not later than the tenth day of June, may disapprove any increase or addition to the executive capital budget or executive capital program or any increase or addition to any capital project in the executive capital budget or executive capital program, or any change in term or condition of the executive capital budget or executive capital program. The mayor shall return the capital budget and capital program by that date to the board of estimate and council, setting forth his objections in writing.

c. Either the board of estimate by a two-thirds vote of all the members of the board other than the mayor, or the council by a two-thirds vote of all the council members, may override any disapproval by the mayor pursuant to subdivision b of this section with the concurrence of the other body by a majority vote

of all members other than the mayor in the case of the board of estimate.

Section 224. **Amendment.**

a. Upon receipt of a recommendation in writing from the mayor, the board of estimate and the council may amend the capital budget or capital program in the same manner as the adoption of the capital budget and capital program including the right to approve the proposed amendment as submitted or to increase or decrease the amounts of funds proposed to be appropriated thereby, but only if funds are available within the capital budget and the applicable program category of the capital program.

b. Upon the adoption of any such amendment by the board of estimate and by the council, it shall be certified by the mayor, the secretary of the board of estimate, the president of the council and the city clerk and the capital budget shall be amended accordingly.

c. Not later than five days after such certification such amendment shall be filed in the office of the comptroller and shall be published forthwith in the City Record.

Provisions Relating to Contracts:

Section 343. **Public letting.**

a. If the several parts of the work, labor or the supplies, materials and equipment to be done or furnished shall together involve the expenditure of more than five thousand dollars, or in the case of construction, repair, rehabilitation or alteration, the expenditure of more than fifteen thousand dollars, such work or labor or supplies, materials, and equipment or construction, repair, rehabilitation or alteration shall be obtained only by contract on public letting founded on sealed bids under such regulations as shall be made by the board of

estimate, except that in a special case the board of estimate by a two-thirds vote may order otherwise. The terms of such contracts shall be settled by the corporation counsel as an act of preliminary specification to a proposal for bids.

. . . .

Section 349. **Consultant contracts.**

a. Except as otherwise provided by resolution of the board of estimate, no contract for the performance of technical, consultant or person services for which competitive bidding is inappropriate, involving the expenditure of more than ten thousand dollars shall be awarded except after public hearing before and approval by a majority of the board of estimate.

b. Within ten days after the award of any contract for technical, consultant or personal services, notice thereof shall be published in the City Record.

c. This section shall not be applicable to contracts with planners, architects, engineers, or any other person or firm if such person or firm and their estimated fees have been identified in a scope of project approved by the board of estimate pursuant to chapter nine.

d. All mayoral and non-mayoral agencies required to submit contracts to the board of estimate for approval pursuant to this section shall have guidelines setting forth their procedures regarding the use, oversight and reporting of contracts and selection of contractors for consultant, technical and personal services which require approval pursuant to this section. Such guidelines shall include the following matters:

. . .

Provisions Relating to Franchises:

Section 361. **Definition.** The term "streets of the city" as used in this chapter shall include

streets, avenues, highways, boulevards, concourses, driveways, bridges, tunnels, parks, parkways, waterways, docks, bulkheads, wharves, piers and public grounds of waters within or belonging to the city.

Section 362. **Powers of board of estimate.** The board of estimate shall have the control of the streets of the city, except as in this charter otherwise provided, and shall have the exclusive power in behalf of the city to grant franchises or rights or make contracts providing for or involving the occupation or use of any of the streets of the city, whether on, under or over the surface thereof, for railroads, pipe or other conduits or ways or otherwise for the transportation of persons or property or the transmission of gas, electricity, steam, light, heat or power, or the installation of transformer vaults, and to give the consent of the city to any franchise or right of any kind or nature whatsoever for or relating to the occupation or use of the streets of the city under the provisions of the constitution or of any statute.

Section 372. **Requisite vote of board of estimate for approval of resolution.** No such resolution shall take effect unless carried by a three-fourths vote, and the vote shall be shown by ayes and noes as recorded in the minutes of the board.

Section 373. **Powers of the mayor.**

a. The separate and additional approval of the mayor shall be necessary to the validity of every such resolution.

b. Every such resolution shall before it takes effect be presented, duly certified, to the mayor for his approval. Such contract or resolution shall not be effective unless such resolution shall be approved by the mayor within sixty days after it is presented to him, or within

such further time not exceeding sixty days additional as may be authorized by the board of estimate.

Provisions Relating to City Property

Section 384. **Disposal of Property of the city.**

a. No real property of the city may be sold, leased, exchanged or otherwise disposed of except with the approval of the board of estimate and as may be provided by law unless such power is expressly vested by law in another agency.

b. Except as otherwise specifically provided by law:

1. The board of estimate may authorize the sale or lease only for the highest marketable price or rental, at public auction or by sealed bids and after advertisement for at least thirty days in the City Record, of any real property belonging to the city or any interest therein, and no such lease shall run for a term longer than ninety-nine years. Any conveyance or lease may provide for the restriction of the use of such real property to purposes determined by the board of estimate.

. . . .

4. Notwithstanding the provisions of this charter, or any general, special, or local law to the contrary, the board of estimate may, with the approval of a majority of the members of the borough board of the borough in which such real property is located, lease any real property of the city, except inalienable property or any interest therein, to a local development corporation without competitive bidding and for such purpose or purposes and at such rental as may be determined by the board of estimate to be in the public interest, and no such lease shall run for a term longer than ninety-nine years.

5. Review by a community board or borough board of any proposal or application for the sale, lease (other than lease of office space), exchange or other disposition of city property or of property for the use of the city shall be in the manner specified pursuant to section one hundred ninety-seven-c. Such review shall be limited to the land use impact and implications of the proposed transaction.

(a) A community board may waive the conduct of a public hearing and the preparation of a written recommendation with respect to any proposed lease of property which in the judgment of the board does not involve a substantial land use interest.

(b) The city planning commission may waive a public hearing on any proposal or application involving a lease of property.

6. The city planning commission shall act on any proposed lease of property of or for the city within sixty days of filing with it of the recommendation of a community board or borough board, or the latest filing if there is more than one filing within the time allowed under section one hundred ninety-seven-c. The commission may waive a public hearing on any proposal or application involving a lease of property.

Nos. 87-1022, 87-1112

Supreme Court, U.S.
FILED
JUN 13 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of New York, ANDREW STEIN, individually and as City Council President, HARRISON J. GOLDIN, individually and as Comptroller for the City of New York, HOWARD GOLDEN, DAVID N. DINKINS, STANLEY SIMON, CLAIRE SHULMAN, RALPH J. LAMBERTI, each individually and as Borough Presidents of the boroughs of the City of New York,

Appellants,

—and—

ROBERT A. STRANIERE, individually and as a member of the New York State Assembly,

Intervenor-Appellant,

—against—

BEVERLY MORRIS; JOY CLARKE HOLMES; JOANNE OPLUSTIL,

Appellees.

FRANK V. PONTERIO,

Intervenor-Appellant,

—against—

BEVERLY MORRIS; JOY CLARKE HOLMES; JOANNE OPLUSTIL,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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APPEAL DOCKETED DECEMBER 17, 1987
PROBABLE JURISDICTION NOTED APRIL 4, 1988

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Supplemental Reply Affirmation of Frank V. Ponterio, Read in Reply to a Letter, with Enclosures, from Richard Emery to this Court, dated May 17, 1985 with Annexed Exhibit ..... JA 606

Exhibit (1): Letter from John F. Banzhaf, III, to Edward R. Neaher, Circuit Judge, dated May 22, 1985 ..... JA 620

Letter from Mr. Marchi to Edward R. Neaher, Circuit Judge, dated June 11, 1985 ..... JA 626

THE FOLLOWING ITEMS APPEAR IN THE APPENDIX TO THE JURISDICTIONAL STATEMENT AT THE PAGES SPECIFIED

	PAGE
Memorandum and Order of the United States District Court for the Eastern District of New York, dated December 1, 1982	208
Decision of the United States Court of Appeals for the Second Circuit, dated May 16, 1983	186
Memorandum and Order of the United States District Court for the Eastern District of New York, dated August 21, 1984	119
Opinion and Judgment of the United States District Court for the Eastern District of New York, dated November 19, 1986	55
Decision of the United States Court of Appeals for the Second Circuit, dated October 8, 1987	5
Notice of Appeal of Municipal Defendants filed with the United States Court of Appeals for the Second Circuit on October 15, 1987	1
Notice of Appeal of Intervenor-Appellant Straniere filed with United States Court of Appeals for the Second Circuit on November 6, 1987	4a
Relevant Provisions of the New York City Charter Pertaining to the Powers and Duties of the N.Y.C. Board of Estimate	230

United States Court of Appeals for the Second Circuit Docket Sheet

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Official Caption[1]

Docket Nos. 86-9019, 86-9041, 86-9059

BEVERLY MORRIS; JOY CLARKE HOLMES; JOANNE OPLUSTIL,

Plaintiffs-Appellees,

v.

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as City Council President, HARRISON J. GOLDIN, individually and as Comptroller for the City of New York, HOWARD GOLDEN, DAVID N. DINKINS, STANLEY SIMON, CLARE SHULMAN, RALPH J. LAMBERTI, each individually and as Borough Presidents of the boroughs of the City of New York,

Defendants-Appellants,

FRANK V. PONTERIO,

Intervenor-Defendant-Appelllant,

ROBERT A. STRANIERE, individually and as a member of the New York State Assembly,

Intervenor-Defendant-Appellant.

Authorized Abbreviated Caption[2]

Docket Nos. 86-9019, 86-9041, 86-9059

MORRIS v. BOARD OF ESTIMATE

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[1] Fed. R. App. 12(a) and 32(a).

[2] For use on correspondence and motions only.

United States Court of Appeals for the Second Circuit Docket Sheet

ATTORNEYS

Appellees:

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United States Court of Appeals for the Second Circuit Docket Sheet

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[for: Peter F. Vallone, Susan Belgard, Peter L. Zimroth]

United States Court of Appeals for the Second Circuit Docket Sheet

DATE	FILINGS—PROCEEDINGS
12– 3–86	Copy of district court docket entries and notice of appeal on behalf of defendants-appellants THE BOARD OF ESTIMATE, THE CITY OF NEW YORK et al filed
12– 3–86	Copy of receipt: payment of docketing fee in district court filed 86-9019
12 –5–86	Appellants BOARD OF ESTIMATE, CITY OF NY et al Form C filed (wy copy of lower decision) Appellants Form D filed
12–10–86	Copy of district court docket entries and notice of appeal on behalf of intervenor-defendant-appellant FRANK V. PONTERIO filed 86-9041
12–10–86	Copy of receipt re: payment of docketing fee in district court filed
12–15–86	Appellant FRANK V. PONTERIO Form C filed Appellant Form D filed
12–17–86	Copy of district court docket entries and notice of appeal on behalf of intervenor-defendant appellant ROBERT A. STRANIERE filed 86-9059
12–17–86	Copy of receipt re: payment of docketing fee in district court filed
12–19–86	Intervenor Appellant Straniere Form C filed Intervenor Appellant Form d filed
12–19–86	Scheduling Order #1 filed (86-9019, 8 -9041, 86-9059)
12–31–86	Record on appeal filed (original papers of district court)

United States Court of Appeals for the Second Circuit Docket Sheet

DATE	FILINGS—PROCEEDINGS
12–31–86	Appellants BOARD OF ESTIMATE, CITY OF NY, et al motion for extension of time to file appellant's briefs filed (w/pfs) (4cc) (orig to Staff counsel)
1–12–87	ORDER GRANTING appellants, BOARD OF ESTIMATE, ET AL motion for enlargement of time in which to file appellant's brief to the extent that the appellant's br and jt appdx shall be filed on 02-20-87; the appellee's br shall be filed on 03-23-87; and the apppeal shall be ready to be heard as early as the week of 04-06-87 FILED (scheduling order #2 endorsed on motion of 12-31-86).
2–19–87	Movant JOHN J. MARCHI consent to intervention as amicus curiae, filed.
2–19–87	Amicus curiae JOHN J. MARCHI brief, received. (awaiting filing of Appellants brief).
2–20–87	Movant STATEN ISLAND LEAGUE FOR BETTER GOVERNMENT consent to intervention as amicus curiae, filed.
2–20–87	Amicus curiae STATEN ISLAND LEAGUE FOR BETTER GOVERNMENT brief, received. (awaiting filing of Appellants' briefs).
2–20–87	Appellant PONTERIO brief, received.
2–20–87	Appellant BOARD OF ESTIMATE, ET AL. joint appendix received.
2–23–87	Appellant STRANIERE brief, filed. w/pfs.
2–23–87	Appellants THE BOARD OF ESTIMATE, ET AL. brief, filed. w/pfs.

United States Court of Appeals for the Second Circuit Docket Sheet

DATE	FILINGS—PROCEEDINGS
2–23–87	Appellants THE BOARD OF ESTIMATE, ET AL. joint appendix, filed. w/pfs. (3 vols.).
2–23–87	Appellant PONTERIO brief, filed. w/pfs.
2–23–87	Amicus Curiae STATEN ISLAND LEAGUE FOR BETTER GOVERNMENT brief, filed. w/pfs.
2–23–87	Amicus Curiae JOHN J. MARCHI brief, filed. w/pfs.
3–12–87	Appellee BEVERLY MORRIS, ET AL. motion for leave to file motion out-of-time and for leave to file an over-length brief without page-proofs, filed. w/pfs.
3–16–87	Movant JOHN F. BANZHAF III motion for leave to file motion out of time and to file brief amicus curiae FILED (w/pfs).
3–16–87	Movant JOHN F. BANZHAF III Motion for leave to file motion out of time and to file appendices to amicus curiae brief FILED (w/pfs).
3–16–87	Movant JOHN F. BANZHAF III motion for leave to file motion out of time and to participate in oral argument FILED (w/pfs).
3–16–87	Movant JOHN F. BANZHAF III—Amicus Curiae Brief RECEIVED (w/pfs). [10]
3–16–87	Movant JOHN F. BANZHAF III—Amicus Curiae appendix RECEIVED (w/pfs). [10]
3–19–87	Order granting appellee BEVERLY MORRIS, et al motion for filing an overlength brief, out of time without page proofs filed.

United States Court of Appeals for the Second Circuit Docket Sheet

DATE	FILINGS—PROCEEDINGS
3–23–87	Movant Peter F. Vallone et al motion for leave to file a brief of Amici Curiae and to argue orally.
3–23–87	Movant CITIZENS UNION motion for leave for Citizens Union as Amicus Curiae and to have five (5) minutes for oral argument filed (w/pfs)
3–23–87	Movant CITIZENS UNION motion for leave to file brief on behalf of amicus curiae, filed, w/pfs.
3–23–87	Appellees BEVERLY MORRIS, ET AL—Brief FILED (w/pfs).
3–27–87	Intervenor-defendant-appellant FRANK V. PONTERIO affidavit in opposition to movant Peter F. Vallone motion for leave to file a brief of amicus curiae and to argue orally filed (w/pfs)
4– 8–87	Appellant FRANK V PONTERIO reply brief, filed. w/pfs.
4– 8–87	Appellants THE BOARD OF ESTIMATE, ET AL. reply brief, filed. w/pfs.
4– 8–87	Movant JEROME X O'DONOVAN revocation of consent to be listed as one of the amicus curiae, as represented by Peter F. Vallone & Susan Belgard, filed.
4–13–87	Movant League of women Voters of the City of New York letter brief in support of position and argument set forth in the brief of movant/amicus curiae Citizens Union of the City of New York filed.

United States Court of Appeals for the Second Circuit Docket Sheet

DATE	FILINGS—PROCEEDINGS
4–23–87	Order granted Professor John F. Banzhaf III motion to file brief as amicus and leave to file motion out of time filed (endorsed on motion filed 3/16/87)
4–23–87	Brief of Professor John F. Banzhaf III filed (w/pfs)
4–23–87	Order granted amicus Curiae Prof. Banzhaf motion for leave to file appendicies to amicus curiae brief and leave to file motion out of time filed (endorsed on motion filed 3/16/87)
4–23–87	Amicus Curiae appendicies by Prof. Banzhaf III filed (w/pfs)
4–23–87	Order denied amicus Prof. Banzhaf motion for leave to participate in oral argument and leave to file motion out of time filed (endorsed on motion filed 3/16/87)
4–23–87	Order granted Citizen's Union motion to file brief on behalf of amicus curiae filed (endorsed on motion filed 3/23/87)
4–23–87	Brief for Citizens Union as amicus curiae filed (w/pfs)
4–23–87	Order granted amicus curiae Vallone, et al leave to file brief; motion to participate in oral argument denied filed (endorsed on motion filed 3/23/87)
4–23–87	Brief for amicus curiae Peter F. Vallone, et al filed (w/pfs)

United States Court of Appeals for the Second Circuit Docket Sheet

DATE	FILINGS—PROCEEDINGS
4–23–87	Intervenor defendant appellant Straniere affidavit in opposition to motion to file brief & orally argue as amici curiae received (after motion was granted)
4–29–87	Appellant ROBERT A. STRANIERE statement pursuant to rule 28(i) to join the arguments submitted in the reply briefs of his co-appellants FILED (w/pfs nfs) [per JD]
5 –4–87	Case heard before Oakes, Newman, Pierce, C.JJ.
5–11–87	Clarifying letter (as per request of panel in open court), filed. (filed by Appellant CITY OF NEW YORK).
5–12–87	Appellant PONTERIO letter in response to clarifying letter (filed on 5-11-87), filed.
5–12–87	Appellant PONTERIO clarifying letter (as per request of panel in open court, filed.
5–12–87	Amicus curiae JOHN F. BANZHAF III response letter to clarifying letter of Appellant CITY OF NEW YORK, filed.
5–21–87	Amicus Curiae CITIZENS UNION response to clarifying letters, filed.
10– 8–87	Judgment affirmed, Published Signed Opinion filed (JLO) Judge Newman concurred on separate opinion
10– 8–87	Judgment filed
11– 4–87	MANDATE (judgment, opinion) issued to EDNY.

United States Court of Appeals for the Second Circuit Docket Sheet

DATE	FILINGS—PROCEEDINGS
12–16–87	Appellant Frank V Ponterio notice of appeal to the Supreme Court of the United States, filed. (per EBG).
12–30–87	Notice of filing of petition for writ of certiorari (filed 12/17/87)
1–14–88	Notice of Filing an Appeal on behalf of appellant Frank V. Ponterio on Dec. 31, 1987 supreme court #87-1112 Filed.
4– 6–88	Certified copy of order of Supreme Court noting probable jurisdiction on behalf of Appellant Bd of Estimate, et al. filed (SC# 87-1022)
4– 6–88	Certified copy of order of the Supreme Court noting probable jurisdiction on behalf of appellant Frank V. Ponterio (SC# 87-1112)

United States District Court Docket Sheet

UNITED STATES DISTRICT COURT

CV 81-3920

Beverly Morris; Joy Clarke Holmes; Joanne Oplustil,

Plaintiffs,

v.

The Board of Estimate, The City of New York, Edward I. Koch, individually and as Mayor of New York, Carol Bellamy, as City Council President, Harrison J. Goldin, individually and as Comptroller for the City of New York, Howard Golden, Andrew Stein, Stanley Simon, Donald Manes, Ralph Lamberti, each individually and as Borough Presidents of the boroughs of the City of New York,

Defendants,

—and—

Frank V. Ponterio,

Intervenor-Defendant,

Robert A. Straniere, individually and as a member of the New York State Assembly,

Intervenor-Defendant.

Challenge to Board of Estimate on One Person, One Vote Grounds Under Fourteenth Amendment
Actions Under Statutes: Civil Rights: Other Civil Rights

United States District Court Docket Sheet

ATTORNEYS

Plaintiffs:

RICHARD EMERY
ARTHUR EISENBERG
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NY, NY 10011

Defendants:

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United States District Court Docket Sheet

DATE	NR.	PROCEEDINGS
12–02–81		Complaint for declaratory and injunctive relief, filed. Summons issued. vw(1)
12–30–81		Summons returned and filed. Executed. gp (2)
01–14–82		Defendants' ANSWER, filed. gp (3)
01–14–82		By Neaher, J.—Stipulation and Order dated 01-82 that defts'. time to answer complaint extended to 01-11-82, filed. gp (4)
2–25–82		BY NEAHER, J.—Initial conf order dtd 2-24-82 that status conf. has been set for 3-19-82 at 9:15 a.m. filed. CM. el (5)
3–23–82		BY NEAHER, J.—Civil motion scheduling order filed. Pltffs shall file moving papers by 4-5-82; defts shall file opposing papers by 5-3-82; pltffs shall reply by 5-17 filed. CM. el (6)
03–31–82		Applicant for Intervention's Notice of Motion returnable 04-15-82 at 10:00 a.m. for an order permitting intervention, etc., filed together with Affidavit of Frank V. Ponterio. gp (7)
03–31–82		Applicant for Intervention's ANSWER, filed. gp (8)
04–06–82		Kramarsky Affidavit and Exhibits A and B in support of Plaintiffs' motion for summary judgment, filed. gp (9)

United States District Court Docket Sheet

DATE	NR.	PROCEEDINGS
04–06–82		Plaintiffs' Notice of Motion for summary judgment pursuant to F.R.C.P. 56 returnable 05-21-82 at 10:00 a.m., filed together with Statement of Facts pursuant to Local Rule 9(g). gp (10)
04–06–82		Plaintiffs' Memorandum of Law in support of Motion for summary judgment, filed. gp (11)
04–09–82		Professor Sanders' supplementary affidavit in support of pltffs' motion for summary judgment, filed. el (12)
04–12–82		Affidavit of Judith A. Levitt in response to Motion to intervene, filed. gp (13)
4–30–82		Intervenor-deft's notice of motion to strike pltff's affidavits and exhibits purs. to FRCP 56(e) filed. 1 el (14)
4–30–82		Intervenor-deft's memo of law in opposition to pltffs' motion filed. (15)
5– 5–82		Ltr. dtd 5-3-82 from Marilyn Glenn, Ctrm. Dep., to Richard Emery, Judith A. Levitt, Frederick A.O. Schwartz, Jr., and Frank V. Ponterio in re: oral argument adj'd from 5-21-82 to 6-11-82 at 10:30 a.m., filed. Copies mailed by ctrm. dep. ad (16)
5–25–82		Notice of cross motion for summary judgment filed. el (17)
5–25–82		Defts' counter statement of facts purs. to Rule 3 (g) filed. el (18)

United States District Court Docket Sheet

DATE	NR.	PROCEEDINGS
5–25–82		Defts' memo of law in support of motion for summary judgment filed. el (19)
6– 8–82		Pltffs' answers to defts' first set of interrogatories, filed. ad (20)
6– 8–82		Pltffs' counsel's affirmation in opposition to intervenor's motion to strike pltff's affidavits, filed. ad (21)
6– 8–82		Pltff's reply memorandum in support of their motion for summary judgment and in opposition to intervenor's motion to strike pltffs' affidavits, filed. ad (22)
6 –8–82		Affidavit of Kathleen Durkin in re: service of Pltffs' memo in support of summary judgment and pltffs' counsel affirmation, filed. ad (23)
6–11–82		Before NEAHER, J.—Case called. All parties present. Pltffs' motion for summary judgment argued. Decision reserved. ad (—)
09–09–82		Stenographer's Transcript dated 06-11-82, filed. gp (24)
12–02–82		Neaher, J. Memo/Order dtd 12-01-82 that the clerk of the Court is directed to enter judgment dismissing the complaint, etc. filed. (See order for details) c/m cm (25)
12– 6–82		Judgment dtd 12-3-82 & filed. Ordered that the pltff take nothing of the defts & that summary judgment is entered in favor of

United States District Court Docket Sheet

DATE	NR.	PROCEEDINGS
		defts, dismissing the complaint, filed. c/m em (26)
12–15–82		Affidavit of service of Kathleen Durkin, filed. em (27)
12–15–82		Pltff's Notice of Motion returnable 12-17-82 @ 10:00 a.m. for reconsideration of the judgment, filed. Affirmation in support of pltff's motion attached. Exhibits annexed. em (28)
12–17–82		Affidavit of Judith A. Levitt in opposition to motion for reconsideration, filed. gp (29)
12–17–82		Affirmation of Frank V. Ponterio in opposition to plaintiffs' motion for reconsideration, filed. gp (30)
12–30–82		By Neaher, J. Memo/Order dtd 12-29-82 denying pltffs' motion to reconsider its decision & judgment, etc., filed. (See order for details) c/m by D.C. em (31)
01–04–83		* * * NOTICE OF APPEAL (pltffs-appellants) from judgment entered 12-06-82 & order entered 12-30-82, filed with receipt #45184 for C of A docketing fee. C of A notified. Affidavit of service attached. 32
2– 4–83		Entire record certified and mailed to C of A. el-
02–23–83		Acknowledgment from C and A for receipt of record, filed. vw (33)

United States District Court Docket Sheet

DATE	NR.	PROCEEDINGS
06–29–83		Certified copy of mandate from C of A dtd 05-16-83 that the decision of the district court is REVERSED N REMANDED, filed. Ack mailed to C of A. Chambers informed. C/A #83-7007 vw (34)
7–13–83		By NEAHER, J.—CIVIL MOTION SCHEDULING ORDER dtd 7-6-83 that defts serve & file moving papers & supporting memo of law n/l/t 9-14-83; pltffs serve & file opposing papers n/l/t 10-5-83; defts serve & file reply n/l/t 10-19-83, filed. mw (35)
7–22–83		By Neaher, J., Order dtd 6-29-83, granting the Citizens Union of the City of New York the right to participate in this case as amicus curiae, filed. So Ordered on letter dtd 6-28-83 from Alan Rothstein to Neaher, J. Exhibits attached. EC (36)
7–22–83		Notice of Motion ret. 7-15-83 at 10:00 for an Order permitting said applicant to intervene as a defendant in this action pursuant to Rule 24(a) or (b) of FRCP, etc., filed. Affidavit of Robert A. Straniere attached. (Noted applicant Straniere) EC (37)
9– 9–83		Letter dtd 9-7-83 to ERN from Judith A. Levitt requesting that the Court amend the current schedule to permit defts to file by 10-5-83 etc. filed. mg (38)
9– 9–83		By NEAHER, J—Order dtd 9-8-83 amending current schedule as contained in document

United States District Court Docket Sheet

DATE	NR.	PROCEEDINGS
		#38. See endorsement on document #38. mg. —
10- 5-83		By Neaher, J., Order dtd 10-4-83, extending briefing schedule for defts' papers from 10-5-83 to 10-19-83 and plaintiffs' reply papers to 11-2-83, filed. So Ordered on letter dtd 10-3-83 from Judith A. Levitt to Neaher, J. EC (39)
10-12-82		Brief for intervenor-defendant Robert A. Straniere, filed. gp (40)
10-17-83		By Neaher, J.—Order dated 10-12-83 that John Marchi is permitted to intervene in case, etc., filed. gp (41)
10-17-83		Letter dated 10-12-83 to Judge Neaher from John J. Marchi in re: papers regarding motion to intervene etc., filed. gp (42)
10-17-83		Applicant's Notice of Motion to intervene as amicus Curiae, filed. gp (43)
10-17-83		Brief of Amicus Curiae, filed. gp (44)
10-17-83		Copy of Brief for intervenor-Defendant Robert A. Straniere, filed. — gp (45)
10-24-83		Letter dated 10-18-83 to Judge Neaher from Susan R. Rosenberg in re: requesting that the to intervene be enlarged to 10-26-83 filed. gp (46)
10-24-83		By Neaher, J.—Order dated 10-18-83 that the request made on document number 46

United States District Court Docket Sheet

DATE	NR.	PROCEEDINGS
		is so ordered filed on document number 46. gp (—)
10-26-83		Intervenor-Defendant Frank V. Ponterio's Notice Of Motion ret. 11-30-83 at 10:00 AM, to deem issues resolved, filed. EC (47)
10-26-83		Intervenor-Defendant Frank V. Ponterio's Memorandum Of Law In Support Of Motion To Deem Issues Resolved, filed. EC (48)
10-26-83		Intervenor-Defendant Frank V. Ponterio's Affidavit in support of Motion To Deem Issues Resolved, filed. EC (49)
10-26-83		Defendants' Memorandum Of Law, filed. EC (50)
10-27-83		Defendants' Memorandum Of Law, filed. EC (51)
11-14-83		By Neaher, J., Order dtd 11-9-83, rescheduling plaintiffs' answering papers for 14-4-83; also Intervenor Pontiero's motion noticed for 11-30-83 will be rescheduled. So Ordered on Letter dtd 11-7-83 from Richard Emery to Naeher, J. EC (52)
11-29	53	By Neaher, J., Order dtd 11-28-83, extending date for filing of Plaintiffs' Brief on Remand until 12-16-83. So Ordered on letter dtd 11-23-83 from Richard Emery to Neaher, J. EC
12-20	54	Memorandum of Law, filed. gp

United States District Court Docket Sheet

DATE	NR.	PROCEEDINGS
12–20	55	Affidavit of Service of Elva M. Woodard, filed. gp
01–17	56	Clerk's Calendar Notice dated 01-16-84 that action scheduled for pre-trial conference on 02-01-84 at 9:15 A.M., filed. gp
2– 1	57	Frank V. Ponterio's Statement pursuant to Local Rule 9(g). EC
2– 1	58	Frank V. Ponterio's Memorandum of Law In Opposition To Plaintiffs' Motion For Summary Judgment On Remand From The Second Circuit. EC
2– 1	59	Frank V. Ponterio's Affidavit In Opposition To Plaintiffs' Motion For Summary Judgment From The Second Circuit. EC
2–22–84	60	Letter dtd 2-8-84 to Judge Neaher from Richard Emery, re: requesting that we present you with these latest papers no later than 2-24-84. filed. (So ORDERED BY JUDGE NEAHER), filed gb
6– 7	61	Plaintiff's Notice of Motion ret. 1-20-84 @ 10:00 AM, for an Order granting summary judgment. EC
6– 7	62	Plaintiff's Statement Of Facts Pursuant to Local Rule 3(g). EC
6– 7	63	Plaintiff's Joint Statement On Issues to Be Decided. EC
6– 7	64	Letter dtd 3-8-84 from Richard Emery to Neaher, J., noting a quick disposal of this

United States District Court Docket Sheet

DATE	NR.	PROCEEDINGS
		action may now be necessary to allow time for the appellate process to run its course, etc. EC
6– 7	65	Letter dtd 3-14-84 from Frank V. Ponterio to Neaher, J., requesting that a noted paragraph be deleted from the previously submitted "Joint Statement On The Issues To Be Decided." EC
8–21	66	By Neaher, J., Memo & Order dtd 8-21-84, that the Court holds that the Abate Test is applicable methodology and when applied reveals 132.9 percent deviation. The Court directs the parties to enter into a joint stipulation addressing possible justifications due 10-5-84. Parties informed. EC
1984		
0–03	67	LETTER dtd 9-28-84 from Susan R. Rosenberg to Judge Neaher in re: requesting extension of time until 10-19-84 to submit the joint stipulate requested by the court. filed ld
0–19	68	JOINT STIPULATION of Policies and interests served by the board of estimate. ld
0–25	69	CLERK'S CALENDAR NOTICE dtd 10-23-84 that the above action has been set for Conference before Judge Neaher on 10-31-84 at 4:00 p.m. ld
0–25	70	LETTER dtd 10-22-84 from Frank V. Ponterio pro se) to Judge Neaher in re: pur-

United States District Court Docket Sheet

1984		
		suanting to 8-21-84 order submitted to Corporation Counsel for the City of New York letter dtd 9-24-84. I communicated by phone my concurrence with the proposed stipulation, requesting that it be permitted to submit to the already filed joint stipulation restoring the two deleted items and the original wording of the third item. ld
0–30	71	By Neaher, J—Order dtd 10-29 pursuanting to 8-21-84 order submitted to Corp. Counsel for the City of New York letter dtd 9-24-84 requesting that i be permitted to submit a supplement to the already filed joint stipulation, restoring the two deleted items and the original wording of the third item. (sign of on document #70) ld
1–01	72	Letter dtd 10-26-84 from Alan Rothstein to J. Neaher in re: regarding responds to the Joint Stipulation of Policies and interts Served by the Board of Estimate dated 10-18-84 (see letter for detail) ld
0–31	—	Before Neaher, J.—Case called. Counsel for all parties present. Conference held. Counsel to submit a proposed time schedule within ten days, to be So Ordered by the Court. rh (Court Reporter Mike Picozzi)
1–13	72	Affidavit of Service for Elva M. Woodard. filed ld

DATE	NR.	PROCEEDINGS
1984		
2–07	73	By Neaher, J—Ltr dtd 12-4-85 from Frederic A. O. Schwartz to Judge Neaher in re: in regarded to the request for additional time. filed (signed off on letter) ld
1985		
1–10	73	Ltr dtd 1-7-85 from David Jaffe to Bob re in: regarding status of the stipulation and asking that it be finalized as expeditiously as possible. filed ld
1–17	74	Copy of letter dated 1-14-85 from David Jaffe, to Hon. Frederick A.O. Schwarz, Jr. re revised Stipulation concerning above-captioned case which has been executed by the three Staten Island parties. filed rh
1–31	75	Plaintiffs' Supplemental Joint Stipulation Of Policies And Interests Served By The Board Of Estimate. EC
2–13	76	By Neaher, J., Stip & Order dtd 2-13-85, that at a time and placed and instead of a hearing the parties including amicus curiae will proceed by affidavits and memoranda of law on the policies and interests which may justify deviations from the one person, one vote formula; all parties agree that defts, intervenors, and amicus curiae shall be permitted to submit further papers within 30 days after this Court approves this stipulation and the parties receive actual notification of such approval. Parties informed. EC

United States District Court Docket Sheet

DATE	NR.	PROCEEDINGS
1985		
3– 8	77	By Neaher, J., Stip & Order dtd 3-6-85, that the case caption is amended as follows (see face of docket for revisions). Parties informed. EC
3–18	78	Intervenor Robert A. Straniere's Affidavit submitted in accordance with the joint stipulation entered into by all parties in this action dtd 2-13-85. EC
3–21	79	John J. Marchi's Amicus Curiae Affidavit w/supporting affidavits. EC
3–22	80	Defts' Affirmation of Susan R. Rosenberg in further support of defts' position. EC
3–28	81	By Neaher, J., Order dtd 3-19-85, granting leave to defts to submit add'l papers to 3-22-85. So Ordered on letter dtd 3-14-85 from Michael C. Harwood. EC
4–16	82	Pltffs'. Affirmation and Exhibits in Support of Summary Judgment. Filed. jl
4–19	83	Affidavit of Alan Rothstein (submitted as per stipulation of parties and *amici*). EC
4–25	84	Reply Affidavit of John J. Marchi filed. EC
5– 2	85	Defts' Affirmation of Susan Rosenberg in reply to some of the points raised by both plaintiffs and defts amicus curiae. EC
5– 6	86	Affidavit of Service re John Marchi Affidavit. EC

United States District Court Docket Sheet

DATE	NR.	PROCEEDINGS
1985		
5– 6	87	Intervenor-Deft Robert Straniere's Reply Affidavit in response to Affidavits filed on behalf of plaintiffs and Amicus Curiae Citizens Union. EC
5– 6	88	Reply Affirmation of Intervenor-Deft Frank V. Ponterio. EC
5– 9	89	By Neaher, J., Order dtd 5-5-85, that defts are given a one week extension of time to 5-3-85 to submit affidavits. So Ordered on letter dtd 4-24-85 from Robert A. Straniere. EC
5– 9	90	By Neaher, J., Order dtd 5-5-85, that Intervenor-deft Ponterio is given a one week extension of time to 5-3-85 to reply to pltff's papers. So Ordered on letter dtd 4-24-85 from Frank Ponterio. EC
5–29	91	Letter dtd 5-21-85 from Alan Rothstein to Neaher, J., in response to reply affidavit of Frank Ponterio. EC
5–29	92	Letter dtd 5-22-85 from John Banzhaf III to Neaher, J., re nature of brief amicus curiae and motion for leave to file same. att. EC
5–29	93	Supplemental Reply Affirmation Of Intervenor-Deft Ponterio. EC
6– 3	94	By Neaher, J., Letter dtd 5-17-85 from Richard Emery So Ordered as to modified

United States District Court Docket Sheet

DATE	NR.	PROCEEDINGS
1985		
		briefing Scheduled. (Order dtd 5-27-85) EC
6– 3	95	Motion of Professor John F. Banzhaf III For Leave To File Attached Brief Amicus Curiae. Att. EC
6– 7	96	Ltr dtd 5-31-85 from pltf atty to S.J. Neaher enclosing copy of memo from Prof. S. Brams in response to Prof. Banzhah's ltr to you, filed. gj
6–10	97	Pltff's counsel's affirmation in response to motion of professor John E. Banzhaf III. eop
6–19	98	Letter dtd 6-11-85 to Judge Neaher from Ms. Rosenberg, re: City defts. do not object to the participation of Professor John F. Banzhaf III as amicus curiae in this law suit. etc. filed gb
6–13–85	99	Affirmation of Intervenor-Defendant Ponterio in support of the motion of John F. Banzhaf III for leave to file A brief Amicus Curiae. Filed. (ent 6-21-85) cb
7– 2–85	100	By Neaher dated 6-17-85, on the letter from Mr. Emery to Judge, so ordered as to restriction on responses. tv
7– 2–85	101	Letter from Mr. Marchi to Judge dated 6-11-85 re materials used at seminar on governance of New York City. Further,

United States District Court Docket Sheet

DATE	NR.	PROCEEDINGS
1985		
		he has no objection to Prof. Banzhaf's mot. to participate as an Amicus Curiae. tv
7– 2	102	Letter from Robert Straniere to Judge dated 6-18-75 stating that he has no objection to Prof. Banzhaf participating as an Amicus Curiae in this case. tv
7–27	103	Steno's transcript dated 10-31-84 filed. (ent'd 2-27-86) vm
7–24	104	Ltr dtd. 7-22-86 addressed to EHN from Richard Emery in re: Urging that the Board of Estimate case find its way to the top of calendar list so that its status as an institution of City govt can finally be resolved. RHF
11–19	105	By NEAHER—Opinion and Judgment dtd 11-19-86 granting pltffs' motion for summary judgment and declaring sections 61 and 62 of the New York City Charter violative of the equal protection clause of the fourteenth amendment to the U.S. Constitution. The City defts are enjoined to undertake curative measures with all deliberate speed, allowing for likely appeals. The Board shall continue to perform its duties under the present plan. Parties notified. ent 11-19 mg
12– 1	106	* * * NOTICE OF APPEAL (defts-appellants) from the judgment dtd 11-19-86 filed with

United States District Court Docket Sheet

DATE	NR.	PROCEEDINGS
1985		
		receipt #81647 for C of A dkt fee. Parties served by clerk. C of A notified. (ent'd 12-1-86) nl
12- 9	107	* * * NOTICE OF APPEAL (intervenor-deft Frank V. Ponterio-appellant) from the judgment dtd 11-19-86 filed with receipt #81815 for C of A dkt fee. Parties served by clerk. C of A notified. nl
12–12	108	* * * NOTICE OF APPEAL (Intervenor-deft Robert A. Straniere—appellant) from the judgment dtd 11-19-86 filed with receipt #81897 for C of A dkt fee. C of A notified. nl
12–24	109	Civil appeal scheduling order dtd 12-19-86 from C of A that the record on appeal be filed by 1-8-87, that the appellants brief & joint appendix be filed by 1-20-87, that the brief of the appellee be filed by 2-10-87 & that the argument of the appeal be heard by week of 3-2-87 filed. C of A #86-9019 & 86-9041. nl

Complaint for Declaratory and Injunctive Relief, dated December 2, 1981

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

BEVERLY MORRIS; JOY CLARKE HOLMES; JOANNE OPLUSTIL,

Plaintiffs,

—against—

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of New York, CAROL BELLAMY, individually and as City Council President, HARRISON J. GOLDIN, individually and as Comptroller for the City of New York, HOWARD GOLDEN, ANDREW STEIN, STANLEY SIMON, DONALD MANES, ANTHONY GAETA, each individually and as Borough Presidents of the boroughs of the City of New York,

Defendants.

Introductory Statement

1. In this action plaintiffs, MORRIS, HOLMES, and OPLUSTIL, three registered voters residing in Brooklyn, challenge sections 61 and 62 of the New York City Charter which result in underrepresentation on the Board of Estimate for the residents of Brooklyn. Sections 61 and 62 of the City Charter, which prescribe the membership and voting structure of the Board of Estimate, therefore, violate equal protection of the law as required by one person, one vote constitutional principles. Plaintiffs seek declaratory and injunctive relief to remedy the dispropor-

tionate representation of other boroughs of the City of New York as compared to Brooklyn in so far as each of the other boroughs has a smaller population than Brooklyn, but a relatively greater share of representation on the Board of Estimate.

Jurisdiction

2. This action is grounded upon the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. 1983 and 1985. Relief is sought pursuant to 28 U.S.C. §2201, and 2202. Jurisdiction is based upon 28 U.S.C. §1331, 1343 and 2201.

Plaintiffs

3. Plaintiffs Morris, Holmes and Oplustil are each citizens of the United States, State of New York and City of New York. Each plaintiff is a registered voter in Kings County.

4. Defendant Board of Estimate is a body of New York City municipal government authorized by Chapter 3 of the New York City Charter. Defendant Board of Estimate is comprised of the Mayor, City Council President, Comptroller and the five borough Presidents of the City of New York. Its functions and operation are more fully described in paragraphs 8 through 9, below, in the portion of this complaint entitled "Factual Allegations."

5. Defendant City of New York is the local municipal entity which is governed, in part, by the defendant Board of Estimate.

6. Defendants Edward I. Koch, Carol Bellamy, Harrison J. Goldin, are Mayor, City Council President and Comtroller of the City of New York, respectively. These defendants hold citywide offices and each of these defendants was elected to his/her office in the last citywide election. Under the New York City Charter each of these office holders is entitled to two votes out of the total of eleven votes allocated to the membership of the Board of Estimate.

7. Defendants Howard Golden, Borough President of Kings County; Andrew Stein, Borough President of New York County; Stanley Simon, Borough President of Bronx County; Donald Manes, Borough President of Queens County; and Anthony Gaeta, Borough President of Richmond County, are the five borough presidents of the boroughs of the City of New York. Each of these defendants was elected by voters in each of their respective boroughs in the last countywide elections. Under the New York City Charter, each of the borough presidents is entitled to one vote out of the total of eleven votes which is allocated to the members of the Board of Estimate.

Factual Allegations

8. Defendant Board of Estimate of the defendant City of New York is a legislative body which is authorized by the New York City Charter to exercise certain general governmental powers which include but are not limited to the following:

A. The Board of Estimate exclusively

i. determines the use, development and improvement of property owned by the City;

ii. approves standards, scopes and final designs of capitol projects for the City;

iii. negotiates and enters into all contracts on behalf of the City;

iv. negotiates and approves all franchises that are granted by the City;

v. grants leases of City property and enters into leases of property for City use;

vi. sets the rates for purchases of water from the City;

vii. sets the charges for sewer services provided by City; and

viii. approves or modifies all zoning decisions for the City.

B. The Board of Estimate acting in the nature of one house of a bicameral legislature

i. recommends and approves the expense budget of the City;

ii. recommends and approves the capital budget of the City;

iii. periodically modifies the budgets of the City;

iv. confers with the City Council when agreement on the budget between the two bodies is not reached;

vi. overrides mayoral votes of budget items; and

vi. holds hearings on budgetary matters.

C. The Board of Estimate also

1. administers the Bureau of Franchises

ii. administers the Bureau of the Secretary;

iii. holds public hearings on any matter of City policy within its responsibilities whenever called upon to do so by the Mayor or in its discretion for the public interest;

iv. holds hearings on tax abatements that are within the discretion of City administrative agencies; and

vi. makes recommendations to the Mayor or City Council in regard to any matter of City policy.

9. The defendant Board of Estimate is comprised of the three defendant citywide officials whom the City Charter grants two votes each, and the five defendant borough presidents who are granted one vote each.

10. The population of the defendant City of New York is 7,071,030.

11. The population of each borough of the defendant City of New York is as follows:

Brooklyn	2,230,936
Queens	1,891,325
Manhattan	1,427,533
Bronx	1,169,115
Staten Island	352,121

12. Allocating the votes of the defendant members of the defendant Board of Estimate according to the propor-

tion of citywide population that each borough contains produces the following results:

	Citywide Votes	*Boroughwide Votes*	*Proportional Votes Total*
Brooklyn	1.89	1.58	3.47
Queens	1.60	1.34	2.94
Manhattan	1.21	1.01	2.22
Bronx	.99	.83	1.82
Staten Island	.30	.25	.55

13. Under the present system mandated by sections 61 and 62 of the Charter of the City of New York, the votes of the defendant Board of Estimate are allocated by borough as follows:

	Citywide Votes	*Borough Votes*	*Total*
Brooklyn	1.89	1	2.89
Queens	1.60	1	2.60
Manhattan	1.21	1	2.21
Bronx	.99	1	1.99
Staten Island	.30	1	1.30

14. The percentage of deviation from fair and equal representation by borough on the defendant Board of Estimate is as follows:

	Percentage of deviation from ideal voting representation
Brooklyn	— 16.7%
Queens	— 11.6%
Manhattan	— .5%
Bronx	+ 9.3%
Staten Island	+136.4%

15. The total extreme of deviation from the representation on the defendant Board of Estimate which would be exactly proportional to the population distributed among the five boroughs is ±153.1%.

16. Under the present system of representation mandated by sections 61, 62, 120 and 222 of the New York City Charter for the defendant Board of Estimate representation of 41.7% of the population of the City of New York can control a majority of votes on every budget measure.

17. Budget measures are the primary legislative function of the defendant Board of Estimate.

18. Upon information and belief, there are several available alternative methods of preserving borough representation on the defendant Board of Estimate without denying to plaintiffs their equal share of representation on the defendant Board of Estimate.

19. Upon information and belief there is no adequate relief available other than the issuance of an injunction to prevent the continuing harm imposed upon plaintiffs by the existence of the present system of voting of the defendant Board of Estimate.

Cause of Action

20. Based upon paragraphs 1 through 19 herein, defendants are violating plaintiffs' right to equal protection of the law as required by one person, one vote principles.

Complaint for Declaratory and Injunctive Relief

WHEREFORE, plaintiffs respectfully pray that this Court issue the following relief:

1. Enjoin defendants, requiring the defendants to take the necessary measures to alter either the membership or the voting structure of the defendant Board of Estimate in order to eliminate the disproportionate representation imposed upon the plaintiffs;

2. Declare sections 61 and 62 of the New York City Charter unconstitutional as violative of one person, one vote principles;

3. Award attorneys fees and costs to plaintiff; and

4. Award all such other relief as may be just and proper in this case.

Dated: December 2, 1981

/s/ RICHARD EMERY
Richard Emery
Arthur Eisenberg
New York Civil Liberties Union
84 Fifth Avenue
New York, New York 10011
(212) 924-7800

Attorneys for Plaintiffs

Defendants' Answer dated January 11, 1982

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81 Civ. 3920 (ERN)

BEVERLY MORRIS; JOY CLARKE HOLMES; JOANNE OPLUSTIL,

Plaintiffs,

—against—

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of New York, CAROL BELLAMY, individually and as City Council President, HARRISON J. GOLDIN, individually and as Comptroller for the City of New York; HOWARD GOLDEN, ANDREW STEIN, STANLEY SIMON, DONALD MANES, ANTHONY GAETA, each individually and as Borough Presidents of the boroughs of the City of New York,

Defendants.

Defendants, by their attorney FREDERICK A. O. SCHWARZ, JR., Corporation Counsel of the City of New York, as and for their answer to the complaint, respectfully allege as follows:

1. Deny each and every allegation contained in paragraph "1" thereof, except admit that plaintiffs purport to challenge sections 61 and 62 of the New York City Charter and seek declaratory and injunctive relief.

2. Deny each and every allegation contained in paragraph "2" thereof, except admit that plaintiffs purport to

predicate this action, the request for relief, and jurisdiction, upon the provisions and statutes set forth therein.

3. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "3" thereof.

4. Deny each and every allegation contained in paragraph "4" thereof, except admit that the Board of Estimate is comprised of the Mayor, City Council President, Comptroller and the five borough Presidents of the City of New York, and respectfully refer the Court to Chapter 3 of the New York City Charter.

5. Deny each and every allegation contained in paragraph "5" thereof.

6. Admit the truth of the allegations contained in paragraph "6" thereof.

7. Admit the truth of the allegations contained in paragraph "7" thereof.

8. Deny each and every allegation contained in paragraph "8" thereof and respectfully refer the Court to New York City Charter § 67 for a statement of the responsibilities of the New York City Board of Estimate.

9. Admit the truth of the allegations contained in paragraph "9" thereof.

10. Admit the truth of the allegations contained in paragraph "10" thereof.

11. Admit the truth of the allegations contained in paragraph "11" thereof.

12. Deny each and every allegation contained in paragraph "12" thereof.

13. Deny each and every allegation contained in paragraph "13" thereof.

14. Deny each and every allegation contained in paragraph "14" thereof.

15. Deny each and every allegation contained in paragraph "15" thereof.

16. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "16" thereof.

17. Deny each and every allegation contained in paragraph "17" thereof.

18. Deny each and every allegation contained in paragraph "18" thereof.

19. Deny each and every allegation contained in paragraph "19" thereof.

20. Deny each and every allegation contained in paragraph "20" thereof.

As And For a First Defense,
Defendants Respectfully Allege:

21. The complaint fails to state a claim upon which relief can be granted.

Defendants' Answer dated January 11, 1982

As And For a Second Defense,
Defendants Respectfully Allege:

22. The one person, one vote principle does not apply to the New York City Board of Estimate.

23. The New York City Board of Estimate is neither the legislative nor general governing body of the City nor is it vested with general governmental powers.

As And For a Third Defense,
Defendants Respectfully Allege:

24. Even if the one person, one vote principle applied to the New York City Board of Estimate, defendants are not in violation of its requirements.

As And For a Fourth Defense,
Defendants Respectfully Allege:

25. The complaint fails to state a claim against defendants in their individual capacities.

As And For a Fifth Defense,
Defendants Respectfully Allege:

26. The complaint is barred by the doctrines of res judicata and collateral estoppel and the principles of stare decisis.

WHEREFORE, defendants respectfully request that the complaint be dismissed, together with such other and further relief as to the Court seems just and proper.

Defendants' Answer dated January 11, 1982

Dated: New York, New York
January 11, 1981.

FREDERICK A. O. SCHWARZ, JR.
Corporation Counsel of
the City of New York
100 Church Street, Rm. 6C12
New York, New York 10007
(212) 566-2091
By: /s/ JUDITH A. LEVITT
Judith A. Levitt
Assistant Corporation Counsel

Plaintiffs' Notice of Motion for Summary Judgment Pursuant to F.R.C.P. 56, dated April 5, 1982, filed with Statement of Facts Pursuant to Local Rule 9(g)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
81-CV-3920 (E.R.N.)

MORRIS et al.,

Plaintiffs,

—against—

THE BOARD OF ESTIMATE et al.,

Defendants.

Please take notice that based upon the affidavits and exhibits in support of plaintiffs' motion for summary judgment and based upon the memorandum in support of plaintiffs' motion for summary judgment, plaintiffs' will move for summary judgment pursuant to F.R.C.P. 56 in the courtroom of the Honorable Edward J. Neaher, United States District Judge, at 225 Cadman Plaza East, Brooklyn, New York, on May 21, 1982 at 10:00 A.M. or as soon thereafter as plaintiffs may be heard.

Dated: April 5, 1982

Respectfully submitted,

/s/ RICHARD EMERY
Richard Emery
Arthur Eisenberg
Attorneys for Plaintiffs
New York Civil Liberties Union
84 Fifth Avenue
New York, N.Y. 10011
212-924-7800

Statement of Facts Pursuant to Local Rule 9(g)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
81-CV-3920 (E.R.N.)

MORRIS et al.,

Plaintiffs,

—against—

THE BOARD OF ESTIMATE et al.,

Defendants.

The following is a statement of the facts which plaintiffs believe to be undisputed, which entitle plaintiffs to summary judgment:

1. Plaintiffs are residents and registered voters in Brooklyn, New York.

2. The Board of Estimate is a body of New York City municipal government authorized by Chapter 3 of the New York City Charter. The Board of Estimate is comprised of the Mayor, City Council President, Comptroller and the five borough Presidents of the City of New York.

3. The City of New York is the local municipal entity which is governed, in part, by the defendant Board of Estimate.

4. Edward I. Koch, Carol Bellamy, Harrison J. Goldin, are Mayor, City Council President and Comptroller of the City of New York, respectively. These elected officials hold

citywide offices and each of these officials was elected to his/her office in the last citywide election. Under the New York City Charter each of these office holders is entitled to two votes out of the total of eleven votes allocated to the membership of the Board of Estimate.

5. Howard Golden, Borough President of Kings County; Andrew Stein, Borough President of New York County; Stanley Simon, Borough President of Bronx County; Donald Manes, Borough President of Queens County; and Anthony Gaeta, Borough President of Richmond County, are the five borough presidents of the boroughs of the City of New York. Each of these officials was elected by voters in each of their respective boroughs in the last countywide elections. Under the New York City Charter, each of the borough presidents is entitled to one vote out of the total of eleven votes which is allocated to the members of the Board of Estimate.

6. The Board of Estimate is comprised of the three defendant citywide officials whom the City Charter grants two votes each, and the five defendant borough presidents who are granted one vote each.

7. The Board of Estimate of the City of New York is a governmental body which is authorized by the New York City Charter, to exercise certain governmental powers which include but are not limited to the following:

A. The Board of Estimate exclusively

i. determines the use, development and improvement of property owned by the City;

ii. approves standards, scopes and final designs of capitol projects for the City;

iii. negotiates and enters into all contracts on behalf of the City;

iv. negotiates and approves all franchises that are granted by the City;

v. grants leases of City property and enters into leases of property for City use;

vi. sets the rates for purchases of water from the City;

vii. sets the charges for sewer services provided by the City; and

viii. approves or modifies all zoning decisions for the City;

ix. sets tax abatements.

B. The Board of Estimate acting in conjunction with the New York City Council

i. recommends and approves the expense budget of the City without the participation of the Mayor;

ii. recommends and approves the capital budget of the City without the participation of the Mayor;

iii. periodically modifies the budgets of the City;

iv. confers with the City Council when agreement on the budget between the two bodies is not reached;

v. overrides mayoral vetoes of budget items without the participation of the Mayor; and

vi. holds hearings on budgetary matters.

Statement of Facts Pursuant to Local Rule 9(g)

C. The Board of Estimate also

i. administers the Bureau of Franchises

ii. administers the Bureau of the Secretary;

iii. holds public hearings on any matter of City policy within its responsibilities whenever called upon to do so by the Mayor or in its discretion for the public interest;

iv. holds hearings on tax abatements that are within the discretion of City administrative agencies; and

v. makes recommendations to the Mayor or City Council in regard to any matter of City policy.*

8. The Board of Estimate is the only municipal body in New York City government which requires New York City's Mayor, Comptroller, City Council President and Borough Presidents to meet regularly and vote together upon issues which concern the governing of New York City.

9. The Board of Estimate's activities are the very same activities traditionally undertaken by municipal legislative bodies and municipal executives in other American cities and constitute general governmental powers.

10. The Board of Estimate's activities affect the geographic area coextensive with New York City.

11. The population of the City of New York is 7,071,030.

* For a complete list of the Board of Estimate's powers with references to Charter and Administrative Code provisions, see Appendix A to Exhibit A (the Kramarsky Study) which is hereby incorporated herein by reference.

Statement of Facts Pursuant to Local Rule 9(g)

12. The population of each borough of the City of New York is as follows:

Brooklyn	2,230,936
Queens	1,891,325
Manhattan	1,427,533
Bronx	1,169,115
Staten Island	352,121

13. The deviations from the norm population per vote inherent in the present representation scheme on the Board of Estimate are as follows:

Brooklyn	—20.1%
Queens	—13.2%
Manhattan	— .5%
Bronx	+ 8.6%
Staten Island	+57.9%

14. The extreme deviation from a norm deviation per vote on the Board of Estimate is plus or minus 78%.

15. Under the present system of representation mandated by sections 61, 62, 120 and 222 of the New York City Charter for the Board of Estimate representation of 41.7% of the population of the City of New York can control a majority of votes on every budget measure.

Dated: April 5, 1982

Respectfully submitted,

/s/ Richard Emery
Richard Emery
Arthur Eisenberg
Attorneys for Plaintiffs
New York Civil Liberties Union
84 Fifth Avenue
New York, N.Y. 10011

Affidavit of Werner Kramarsky, Read in Support of Plaintffs' Motion for Summary Judgment, dated March 29, 1982 with Annexed Exhibit

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

BEVERLY MORRIS, et al.,

Plaintiffs,

—v—

THE BOARD OF ESTIMATE OF THE CITY OF NEW YORK,

Defendants.

Werner Kramarsky, being duly sworn, deposes and says:

1. I am the New York State Commissioner for Human Rights. I have served in this capacity for the past seven years.

2. From 1967 to 1970 I served as Mayor John Lindsay's representative on the New York City Board of Estimate. During that period I attended approximately one hundred (100) bi-monthly Board of Estimate public meetings. I also attended Board executive sessions and participated in all aspects of the Board's decision-making process. I helped develop and implement streamlined Board decision-making procedures. Through my personal experience I became intimately familiar with the operation of the Board of Estimate and with its role in city government at that time.

3. After leaving government service in 1970, I established a consulting firm that provided advice and assis-

tance to organizations doing business with State and municipal governments. In 1973, under a contract from the N.Y. State Charter Revision Commission for New York City, I prepared a report entitled, "The Structure, Powers, and Functions of New York City's Board of Estimate," a copy of which is attached hereto as exhibit A. This report examined the role of the Board of Estimate in New York City government, first by tracing the Board's historical origins and development; second, by describing the Board's functions under the existing charter; and third, by presenting an empirical analysis of the Board policy-making process. In preparing the report, I made extensive use of primary and secondary sources regarding the Board of Estimate.

4. The Board of Estimate exercises extensive general governmental powers essential to the operation of municipal government. It is the body which is primarily responsible for allocating the resources of the New York City government among its citizens. Under the City Charter, the Board exercises exclusive authority over the acquisition, use, development and improvement of city property, the establishment of municipal contracts; the granting of municipal franchises; the setting of municipal water and sewer rates; and the enactment of municipal zoning regulations. In conjunction with the City Council, the Board of Estimate recommends and approves the municipal capital and expense budget.

5. Its exclusive control over municipal property and contracting, and its budgetary powers, ensure that the Board of Estimate exercises primary control over decisions con-

cerning a variety of basic essential city services. Board of Estimate decisions affect the size and composition of the Police and Fire Departments, the number and location of police and fire stations, the number and locations of municipal hospitals, the location of parks, public housing projects, and publicly assisted housing and priorities for the maintenance and alteration of the municipal infrastructure, including buildings, streets, sewers, tunnels, bridges and wharves.

6. The Board of Estimate's budgeting and contracting powers affect the functioning of municipal government in two even more fundamental respects. First, the Board's budgeting and contracting authority effectively provide it with oversight responsibilities for municipal agencies which are frequently involved in items appearing on the calendar for Board consideration and resolution. Agency officials, therefore, must frequently appear before the Board to explain agency decisions, recommendations, actions, or positions.

7. A second, related, and perhaps even more important way in which the Board of Estimate affects municipal governance is its function in resolving disputes between municipal agencies, municipal agencies and private businesses, and between private interest groups, concerning matters over which the Board has ultimate authority. If, for example, the Departments of Parks and Highways are in conflict over their projected uses of municipal land, the Board of Estimate, which has ultimate authority over city land use planning, will resolve the dispute. Similarly, disputes over city land in which private groups have a stake

are resolved by the Board of Estimate. In this way, the Board of Estimate allocates the City's physical assets and balances competing interests of municipal agencies and concerned private constituencies.

8. The Board of Estimate's decisions also significantly effect the allocation not only of the city's public assets, but also of its private assets. The Board of Estimate's decisions concerning tax abatements, zoning, the development of public land, the granting of franchises, the letting of contracts, and others of its exclusive powers have major economic implications for private property owners in this city. Board of Estimate decisions create powerful incentives affecting municipal industrial and commercial development both in the city as a whole and in specific areas of the city. Thus, Board of Estimate decisions directly shape the growth of both the public and private sectors of New York and effectively serve to allocate public and private municipal resources.

9. The Board of Estimate also plays a significant role in determining municipal tax rates. While the Board no longer possesses the power to establish the tax rate, its role in developing the municipal budget and its exclusive powers to determine municipal income accruing from leases and sales of city property, sewer and water rates, and tax abatements, effectively determines how much revenue must be raised through taxation.

10. Of the elected officials who serve on the Board of Estimate, the borough presidents are the least powerful, both in their role as city officials and as a result of the

single vote granted to each in his capacity as a member of the Board of Estimate. Nevertheless, the respective borough presidents are influential to a great degree over matters concerning their boroughs and over city-wide policy as well, especially when a divergence of interests splits the majority votes held by the city-wide office holders. Furthermore, the regular bi-monthly meetings and the consequent compromise process which is the essence of the regular operation of the Board of Estimate serves to enhance the influence and power of the borough presidents in relation to city-wide as well as borough issues. The position that a borough president holds on the Board of Estimate is surely the role in which he has the opportunity to exercise the most power of any granted to his office by the City Charter. It is the single most important institutional method available to him to affect borough and city-wide governmental functions.

11. The Board of Estimate is thus unique among New York City governmental entities in that it exercises considerably more power, in fact, than it is granted formally under the City Charter. By providing a forum in which the most powerful elected officials representing different parts of the city can meet and represent the interests of their particular constituent groups, as well as the City as a whole, the Board of Estimate functions as the central institution for affecting change in New York City. Its powers are so pervasive that it is safe to say that there is virtually no aspect of city life regulated by city government over which the Board of Estimate does not have considerable control. Because it brings together for institutional purposes the most powerful elected officials in the

city, it has evolved into the city's most powerful governmental institution, functionally exercising as an institution, authority over city government far beyond those specifically enumerated in the City Charter.

/s/ Werner Kramarsky
Werner Kramarsky

Sworn to before me this
29th day of March, 1982.

/s/ Martin Silberman
Notary Public

Martin Silberman
Notary Public, State of New York
No. 24-4706592
Qualified in Kings County
Commission Expires March 30, 1983.

Exhibit (A): Annexed to the Affidavit of Werner Kramarsky submitted to the United States District Court, Eastern District of New York

"The Kramarsky Study" of the Board of Estimate

THE STRUCTURE

POWERS AND FUNCTIONS

OF

NEW YORK CITY'S

BOARD OF ESTIMATE

Exhibit Annexed to the Affidavit of Werner Kramarsky

September 14, 1973

Honorable Roy Goodman
Chairman
State Charter Revision Commission
for New York City
270 Broadway
New York, New York 10007

Dear Mr. Chairman:

We are pleased to transmit herewith the report on the Board of Estimate which was commissioned by the State Charter Revision Commission for New York City. In preparing this report, we have drawn extensively upon testimony presented to the Commission, previous Charter revision working papers, Interviews with commissioners and personnel of agencies who deal regularly with the Board, and interviews with the Board's staff and participants in Board proceedings.

The Board of Estimate, we found, is an institution indigenous to the City of New York. It was created, even before the consolidation of 1898, to fulfill the specific, concrete needs of a growing metropolis as governmental problems penetrated the boundaries of its smaller constituent political subdivisions.

We hope that you find the report interesting and useful. We have enjoyed working on it with you and your staff over the past few months.

If we can be of any further assistance, please do not hesitate to call.

Yours very truly,

/s/ Werner H. Kramarsky
Werner H. Kramarsky

Exhibit A Annexed to the Affidavit of Werner Kramarsky

The Structure, Powers, and Functions of New York City's Board of Estimate

Prepared by W.H.K. Communications Associates, Inc.

For the State Charter Revision Commission
For New York City.

August, 1973

Dedicated to the Memory of
John J. Carty
(1908-1970)

Teacher
Civil Service Commission Examiner
Budget Examiner
Junior Budget Examiner
Senior Budget Examiner
Chief Budget Examiner
Assistant Budget Director
First Deputy Comptroller

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Board of Estimate History

For New York City, the ultimate seat of governmental authority has always resided in the State Legislature in Albany. Power over local problems, such as city finances and control of city property, has only gradually devolved upon the city, and all such powers are exercised in the shadow of their possible modification or removal by the State.

Supervision over city property in the 17th and 18th centuries was held by the Common Council, an analogue to the present City Council, and after 1802 by the Comptroller. The Common Council also ruled on the city budget, and the Board of Aldermen (one-half of the Common Council) held the power to grant franchises until 1905. Public improvements could be undertaken only after study and approval by a State Commission, and were financed by local assessments.

In 1864, the Board of Estimate and Apportionment was created for the purpose of estimating the expense of conducting the Metropolitan Police District, which supervised the police in all the boroughs. This first step towards centralization was a necessary response to the fact that effective law enforcement required a police force whose jurisdiction was not limited to small localities. The Board of Estimate's creation was an organic response to the necessity of administering a governmental agency which encompassed several autonomous constituencies. The new Board was composed of the Commissioners of the Metropolitan Police (appointed by the Governor), and the Comptrollers of New York City and Brooklyn (who were chosen by the Common Councils of their respective cities.) The new Board was the first institutionalization of interborough co-

operation. The Metropolitan Police District was abolished in 1870, but the precedent was established for making the Board the caretaker of city-wide interests.

In 1873 a new New York City Charter provided for a Board of Estimate and Apportionment to manage the city's budget. It consisted of the Comptroller, the President of the Board of Aldermen, (both appointed by the Common Council), the Mayor, and the President of the Department of Taxes and Assessments. Beginning in 1884, the Comptroller and President of the Board of Aldermen were popularly elected. The addition of the Corporation Counsel in 1893 gave three of the five Board votes to the Mayor and his appointees.

The growth of the Board's power furthered the centralization of government within New York City, and, as the outer boroughs entered its sphere, strengthened the position of the city vis-a-vis New York State. The Board's smaller size and city-wide character enabled it to transact city business more smoothly on the Board of Aldermen and more effectively than the distant legislature in Albany.

After the consolidation of 1898, the Board continued its function of estimating the expense of conducting the city government, establishing a tax based on the estimate, transferring funds from one department to another, issuing stocks and bonds.[1] The issuing of stocks or bonds by one of the city boards (i.e. the Bureau of Rapid Transit) to underwrite capital construction costs could only take place with the approval of a majority of the Board acting upon a request by the Board of Aldermen.[2]

A significant change was that while under the pre-consolidation system the Board of Estimate submitted the budget to the Board of Aldermen which made changes subject to final Board of Estimate approval, the 1898 con-

solidation Charter adopted the Brooklyn system under which the new bicameral Municipal Assembly had final say on the budget. The Municipal Assembly, while not empowered to add to the budget, could cut down on any item without further review by the Board. The Municipal Assembly consisted of the Board of Aldermen (the 60 member lower house) and the City Council (the 29 member upper house.)

On the executive level of city government there also existed a Board of Public Improvements. This Board consisted of the Mayor, the Comptroller, and the heads of all city departments. Borough Presidents were also entitled to sit on the Board, but only allowed to vote on matters concerning their own boroughs. The Board of Public Improvements' basic function, in effect, was to regulate the city's capital expenditures. Both the Board of Estimate and the Board of Public Improvements served as a check on the possible extravagances of the Municipal Assembly in the area of capital expenditures.[3] The Board of Public Improvements was also controlled by the Mayor's office. This Board of Public Improvements was quite similar in composition and function to the present Site Selection Board.

The Comptroller's function under the new Charter continued to be that of the city's chief financial officer. He had the power of investigation and with it the right to subpoena. The power to audit all vouchers, official accounts, incoming revenues, and to prescribe methods for the accounting, recording and reporting of all financial transactions were also part of the Comptroller's duties. In addition, the Comptroller had the power to settle and adjust all claims either for or against the city. All city monies, their receipt and expenditure, in whatever way, to or from

whatever source, were to be included in the Comptroller's year-end report. The Comptroller's superior ability to gather information about the city's finances put him in a pivotal position on the Board of Estimate, especially when there were conflicts within the Board or between different branches of government.

The Manhattan wing of the Democratic Party exercised considerable influence on the government of the newly consolidated City of New York. The hegemony of the Manhattan wing was demonstrated in 1898 with the consolidated city's first mayoral election. The Manhattan organization's candidate won easily in a four-man race against an insurgent, a fusion Democratic candidate, and the Republican Party's candidate. In 1901, after three years of Manhattan domination, a coalition of Republicans and insurgents, spearheaded by the Brooklyn wing of the Democratic Party, which was disgruntled by its exclusion from the Manhattan dominated government, united to push through a series of amendments to the 1898 Charter.

The New York (State) Charter Revision Commission wrote in 1900:

> The Board of Estimate and Apportionment under our draft Charter will be the most important body in the city government. Whatever dissatisfaction may have been felt with any other municipal body, the Board of Estimate and Apportionment has generally given satisfaction for its capacity, efficiency and integrity. Under the plan of the Commission it will be in reality the center of all legislative activity in relation to financial affairs, and much of the administrative activity of the City. It will be in effect an upper house of the City Legislature and also a cabinet of the most important administrative officers.[4]

The Board of Estimate was reconstituted into its present form combining the functions of the old Board with that of the Board of Public Improvements. The new Board of Estimate consisted of the Mayor, the Comptroller, the President of the Board of Aldermen, and the Borough Presidents, with weighted votes distributed as follows: Mayor —3 Comptroller—3; President of the Board of Aldermen —3; Borough President of Brooklyn—2; Borough President of Manhattan—2; Borough President of Queens—1; Borough President of Staten Island—1; and the Borough President of the Bronx—1. In the new Board of Estimate the Borough Presidents were represented as full voting members on every item, including budgeting.[5]

The 1901 Charter abolished the City Council but retained the Board of Aldermen as the new unicameral City Legislature. The Board of Aldermen could decrease, but not increase the budget.

The changes brought about by the 1901 Charter redistributed executive power away from the Mayor and toward the boroughs. The abolition of the city-wide Board of Public Improvements gave supervision over highways, sewers, and public buildings to the Borough Presidents, although financial control was vested in the Board of Estimate and Apportionment. The Borough Presidents now had broad executive powers involving the delivery of municipal services, as well as enhanced power with regard to borough planning and development. In addition, independent state funding of administrative offices like Sheriff, County Prosecutor, etc., reinforced the county as a prime unit of city government. The county governments were so important as a source of jobs that, in 1913, Tammany leader Charles F. Murphy persuaded the State legislature to make the borough of the Bronx into an independent County.

The Board of Estimate, however, remained the city's chief budget making and financial body. The Board's responsibilities included preparing the annual budget and setting the terms and conditions for expenditures. Although the Mayor and his slate of publicly elected city-wide officials could still command a majority of the votes on the Board, the inclusion of the Borough Presidents on the Board diminished his authority somewhat.

Under the 1901 Charter, the Board had the residual powers of the city, those powers not specifically granted to other agencies. The fact that this power gravitated to the Board was symbolic of its whole evolution. When other agencies of government functioned adequately, their powers were transferred to the Board—almost always a satisfactory alternative because of its representative character and its record of achievement.

From 1901 to 1938, the Board of Estimate continued to grow in power and prestige. In 1905, there was a scandal over the granting of a franchise by the Board of Aldermen to the Pennsylvania Railroad, and chapter 629 of the Laws of that year vested in the Board of Estimate and Apportionment control over franchises, as well as, with several exceptions, general "control of all the streets, avenues, highways, boulevards, concourses, driveways, bridges, tunnels, parks, parkways, waterways, docks, bulkheads, wharves, piers and all other public grounds and water within or belonging to the City."[6] The powers of the Board of Aldermen in these areas were to be subject to Board of Estimate control.

In 1911, the Board gained the power to pass on improvements and make assessment therefor.[7] In 1916, it was empowered to create zoning regulations,[8] and in 1920 it

was made trustee of the City Employee Retirement System.[9]

De jure recognition of the Board's status was given in 1924, when it was constituted as the upper house of the municipal legislature, established under the new City Home Rule Law.[10] Although it was hoped that the lower house, the Board of Aldermen, would take the lead in legislative matters, leaving the Board of Estimate free to run the city's business, the goal was never realized. By 1932, the situation was such that the Joint Legislative Committee to Investigate the Affairs of the City of New York could write,

> The Board of Estimate and Apportionment has been increasing in power and prestige even more rapidly than the Board of Aldermen has been sinking in usefulness and public esteem. Today, it is essentially the governing body of the city, combining within itself policy-forming and legislative functions, for although some of these, it is true, must be shared with the Aldermen, their concurrence therein has very nearly become pro forma and indeed in a number of matters their concurrence is obligatory.[11]

The election of a Republican-Fusion Mayor and his slate of city-wide candidates in 1933 gave the new Mayor the votes needed to exercise working control over the Board of Estimate. However, the Mayor's advantage was undermined by a combination of chance and political circumstance. In 1934 the Comptroller died and the next year brought the death of the President of the Board of Aldermen also. In a special election held to fill the Comptroller's office, the incumbent Mayor's candidate was defeated by a Democrat. A Democrat also succeeded to the presidency

of the Board of Aldermen. These changes left the Mayor in a minority on the Board of Estimate.

Simultaneously a movement for Charter Revision supported by a diverse coalition of civic leaders and government officials, was gathering momentum. This movement came to fruition in the form of the Thacher Commission, whose members were appointed by the incumbent Mayor.

The Thacher Commission recommended that the duties of the Comptroller be divided into those which were clerical and those which required the Comptroller to act as the city's principal financial advisor. The clerical functions would be handled by a City Treasurer, appointed by the Mayor. The Treasurer's duties would include the collecting of all taxes, assessments and arrears due the city and their deposit in banks. This would include the money in the sinking funds and all other funds held by the city. A Bureau of City Collectors and a Bureau of Receipts would be under the control of the City Treasurer, and he would give a financial statement to the Board of Estimate once a month. The Treasurer could not make any disbursements without the approval of the Comptroller.

The mushrooming of federal public works projects during this period had taxed the Board of Estimate's planning capacity, resulting in a movement to relieve the Board of this vast responsibility. There was dissatisfaction with the Board's performance with the allocation of public improvement projects. The practice of "borough-courtesy" led to log-rolling on the Board, unnecessary and inefficient improvements in the boroughs, and an increase in the city's debt.

As a solution to this problem, the Thacher Commission proposed the creation of a five man City Planning Commission to be appointed by the Mayor with the members

serving staggered eight year terms. The City Planning Commission's functions included: the development of a master plan for the city, responsibility as custodian of the city map and all changes thereon, and overall charge of all projects and changes in the city's master plan after such a plan was developed. The City Planning Commission's report on such proposed changes could be overruled by a ¾ths majority vote of the Board of Estimate.

The City Planning Commission's capital budget, however, was not an appropriation document. The Board of Estimate had to approve it line-by-line, a power which allowed it to exercise close supervision of all capital expenditures.

Despite opposition from the Democratic organization, the Borough Presidents of Manhattan, the Bronx, Queens and Staten Island, the Thacher Commission's proposed charter was adopted by a two to one majority in the November 1936 election. Members of the Board of Estimate, hostile to the incumbent, saw the City Planning Commission as an attempt to increase the power of the Mayor at their expense.

The new Charter, which took effect January 1, 1938, reestablished a unicameral legislature consisting of a City Council with members elected through a proportional representation scheme, and abolished the Board of Aldermen. The so-called Municipal Assembly with the Board of Aldermen as the lower house and the Board of Estimate as the upper house, which had been established by the City Home Rule Law of 1924, was ended. The powers of the Borough Presidents over the maintenance of public buildings were transferred to the Department of Public Works, and those over building violations were transferred to the Department of Housing and Buildings.

The Thacher Commission said in its report,

> The relative functions of the Council and the Board of Estimate are altered in several important respects. The Council is the legislative body and is vested with the entire legislative power of the city. All municipal legislation is to be by local law, rather than by ordinance, and local laws may be initiated only in the Council, which will alone constitute the local legislative body under the City Home Rule Law. The primary function of the Board of Estimate, on the other hand, is to direct the business affairs of the city. It will have no control over legislation except that local laws having to do with certain subjects directly related to the organization and administration of the government and amendments to the Charter require its approval. It also passes upon the expense budget as submitted by the City Planning Commission. Local laws may be vetoed by the Mayor subject to the power of the Council to pass them over such veto by a two-thirds vote.[12]

The Board of Estimate exercises no control over legislation except to check the Council in respect to the organization and administration of the government and to approve or disapprove amendments to the Charter. It has general control over the financial policy of the city. It passes on the Mayor's budget, and is free to amend it by adding, increasing, decreasing or omitting items. After the Board of Estimate has passed the budget, it goes to the Council, which may only reduce or strike out the amounts appropriated for particular items. The Board of Estimate holds hearings, so that it is before this small group of elected officers

> that the people have an opportunity to criticize the budget or any item in it.[13]

The re-election, in 1937, of the incumbent Fusion administration and its city-wide slate obviated any confrontation between the Board of Estimate and the Mayor. In addition, the restoration of the incumbent Mayor's majority on the Board of Estimate retarded the development of the City Planning Commission as the independent body it was supposed to become. Another impediment was the case of *Childs* v. *Moses* which held, in 1942, that the City Planning Commission was an advisory body and could not execute city powers or expend city funds without the approval or acquiescence of the Board of Estimate.[14]

Under the 1936 Charter, all powers vested in the city, except as otherwise provided by law, were kept with the Board of Estimate as a protection against executive and legislative excesses. As the administrative body of the city, the Board was given power to fix salaries, approve franchises, authorize sales or leases of city property, and pass finally on matters involving the exercise of judgment with respect to finances.[15] It remained, in effect, a "board of directors" for the management and administration of municipal affairs. As a political body with managerial duties, the Board's basic function was to resolve conflicts between competing constituencies and interests.

The major thrust of the 1936 Charter was that it allowed the Board of Estimate to maintain its predominant position in city government. Despite a body of opinion favoring its abolition, the Board of Estimate was retained as an essential part of the decision-making process, because it was the body capable of reconciling neighborhood and city-wide interests.

The next major structural change in the Board of Estimate came in 1958, in response to the population growth in the boroughs of the Bronx, Queens, and Staten Island. Votes on the Board were redistributed; all the Borough Presidents were given two votes each, and each city-wide elected official was increased to four. Thus, the city-wide officials could still command a majority of the votes, though the Borough Presidents were now equal in power.

In spite of these alterations, the Board of Estimate was essentially the same as it had been in 1901. The city, however, had changed drastically. In 1901, the city was a loose consolidation of formerly autonomous entities. The growth of the subway system, the mass use of automobiles along the city's highway system, and the introduction of the telephone and television slowly integrated city life. Technology was making centralization of city government more feasible. The expansion of the city's budget and the ever-blossoming variety of services it provided led many to recommend such centralization.

In 1960, the State Commission on Governmental Operations of the City of New York (Moore Commission) criticized the city's system of government, especially the vesting of such broad powers in the Board of Estimate. The Commission concluded that the ambiguous diffusion of executive and legislative power among the Mayor, Board of Estimate, and City Council made it difficult for voters to assign responsibility for different policies. The Board's practice of reaching decisions *in camera,* prior to hearing public testimony, frustrated the voters who wished to participate in the decision-making process. The Commission proposed a strong Mayor, and a Council whose every important act was not subject to Board of Estimate veto; that latter body, in this view, should be largely limited to planning matters.

The political situation in 1961 gave added impetus to yet another movement for Charter revision. The Mayor decided to stand for re-election with running mates different from the incumbents, thereby exacerbating his differences with the five county leaders of the Democratic Party and the Borough Presidents, their political allies. In any case, there was the possibility that the political harmony of the Board of Estimate would not last beyond the November elections.

The Mayor gained from the State Legislature the power to appoint a charter revision commission (Cahill Commission), whose draft charter would be submitted to the voters on the November ballot. Such were the political possibilities of Charter revision that the City Council and the Board of Estimate refused to appropriate funds for the Commission's work. These tactics were unsuccessful, and both the Mayor and the new Charter were victorious in November.

The new Charter, which took effect on January 1, 1963, significantly reduced the Board of Estimate's power over the budget. The Board now shares with the City Council the power to alter the budget, but changes made by either body are subject to a mayoral veto which can be overridden only by a two-thirds vote on *both* bodies. The Board lost its line supervision of the expense budget; it now must approve or disapprove an entire program. Transfers are therefore less frequent, but in any case, are now on recommendation by the Mayor, and require approval of the Council as well as the Board of Estimate. The Mayor alone may make changes within a department between programs.

The Board's control over the capital budget was likewise decreased under the new Charter. It was to be an appro-

priation document, meaning that projects provided for in the capital budget do not require further appropriations by the Board. Such projects are to be initiated by the Mayor after a hearing by the Board. The Mayor, not the Board of Estimate, is empowered to authorize increases of up to fifteen percent of the cost of projects.

Most of the Board's control over personnel is transferred to the Mayor, to whom career and salary plans are submitted by the Personnel Director. The Mayor is authorized to reorganize departments without approval of the Board, as formerly required. City Council approval is now mandatory. The Mayor can, by executive order, create bureaux, divisions and positions within his own executive office.

As already indicated, the Board lost part of its control over the capital budget. It does, however, retain control over the zoning aspect of city planning, for it can approve, disapprove or modify recommendations of the City Planning Commission. It may adopt, by three-fourths vote, any zoning resolution which the Mayor has certified as necessary, but which the City Planning Commission has rejected. The Board still retains control over franchises, leases of waterfront property, the sale, leasing and assigning of city-owned property, regulations for letting contracts and related trusteeship functions. The Board also has certain powers conferred upon it by the State legislature (urban renewal plans, plans for public and publicly-assisted housing, grants of tax exemptions, etc.). However, the residual powers of the city are now vested with the Mayor, instead of the Board.

The Borough Presidents also lost executive power with respect to the delivery of city services within their respective areas. Though this change did not decrease the power

of the Board as a whole, it did reduce the Borough Presidents' influence.

The budgetary responsibilities of the Board of Estimate have been substantially limited by the 1961 Charter revision. This constitutes a reversal of the movement of power from Council and Mayor to the Board of Estimate which began in 1901. However, the central problem of ordering governmental priorities between the competing claims of neighborhood and city-wide interests still remains. Throughout the city's history the Board of Estimate has been the principal body where this conflict, and, most significantly, the resolution of this conflict, has been deliberately institutionalized.

As Walter Lippman wrote 37 years ago:

> The city is much too big to be governed as a single centralized unit. It is also too varied in its population and its occupations. It is also too old in the traditions of local independence. On the other hand, of course, the interests of the people in all the boroughs are much too closely related not to be dealt with under city-wide and co-ordinated policies.[16]

The conflict between city-wide and local priorities, which necessitated the creation of the Board of Estimate, still exists.

The Nature of the Board of Estimate

It has been more than ten years since Charter revision last dealt with the powers of the Board of Estimate. At that time, the reallocation of responsibilities was designed to strengthen the Office of the Mayor. Despite the vast increase in the power of the Mayor's office since that revision,

the Board of Estimate has retained its position of primacy in the city government. The strength of the Board of Estimate rests, in part, on its mission "to direct the business of the City." [17] It is the ability to resolve policy and priority disputes that characterizes the Board's central and preeminent position in the city government. The members of the Board, each publicly elected, each with a broad and diversified constituency, and each in an executive position, when met and joined, represent a far greater concensus than any other executive body. Their relatively small number enables them to act more decisively than most legislatures.

The Board's jurisdiction and power has often been tested in the courts, and has always been sustained. The most recent major case, *Bergerman* v. *Lindsay,*[18] argued that since budget making was a legislative function, the Board of Estimate was violating the one-man, one-vote rule by giving Borough Presidents (who represent different sized populations) equal power over the budget. This case renewed the dispute as to whether the Board was a legislative, administrative or purely executive body. The court held that the one-man, one-vote principle did not apply to the Board on "city budget matters," as the Board was neither a legislative body nor the "general governing body" of the city (that being the City Council), nor a political unit vested with "general governmental powers." [19] The court opined, however, that until the 1963 Charter revision the Board did exercise far greater legislative powers than it does today. "In any case," the court continued, "the budget making powers of the Board of Estimate are at once closely conditioned and highly contingent on the action of other city agencies, executive and legislative. The Board is itself unable to make or reject a budget with

finality, or to add or delete an item in a budget beyond the further reach or further change by others." [20]

Nevertheless, the nature of the Board and of its functions is such that no precise label can be attached to it. The Thacher Commission claimed its activities to be executive rather than legislative,[21] and described it as an administrative body which "approves franchises, authorizes sales or leases of city property, and passes finally on matters involving an exercise in judgment." [22] It would be best to say that the Board of Estimate, because of its unique position, serves all of these functions and provides a forum for broadly based political decisions under close public scrutiny.

Structure of the Board of Estimate

In its role as the "board of directors" of the City of New York, the Board of Estimate is aided by the Bureau of the Secretary and the Bureau of Franchises, the two permanent agencies under the Board.

Bureau of the Secretary

The Bureau is headed by the Secretary who is appointed and removed at the pleasure of the Board. The Secretary's duties are:

a) preparation of the calendar for Board meetings;

b) publishing journals of the proceedings at Board meetings;

c) distributing to each member copies of all communications, petitions, reports, and the like, which appear on the calendar;

d) sending to each department concerned copies of resolutions passed by the Board, and in return, sub-

mitting to the Board such recommendations and reports on these matters as are submitted by the departments.

Bureau of Franchises

The Bureau is headed by a Director who is appointed and removed at the pleasure of the Board. The Director's duties are:

a) reporting to the Board of petitions for franchises, revocable consents, and related matters;

b) filing copies of all franchises and contracts with the Office of the Comptroller, Director of Finance, Corporation Counsel, New York City Transit Authority, and the City Clerk, Department of Transportation of New York State.

Franchise requests concern such items as changes in bus routes, subways, CATV, etc., whereas revocable consents grant permission for constructing bridges over streets and between buildings, laying underground pipes, conduits, and tracks for private use, and provides guarantees to the city for such use. These consents are revocable at any time by resolution of the Board, which also provides for adequate compensation.

In addition, the Board has also created a Committee for Acquisition and Disposition of City Property, which deals with matters relating to real property. This Committee is composed of the Mayor, the Comptroller, and the President of the City Council.

The Board of Estimate's staff is rather small, since each member has his own staff which researches and reports on the various items appearing on the calendar. In addition,

the Board draws on the Budget Bureau and other mayoral agencies for reports and opinions.

Procedures of the Board of Estimate

Much of the public criticism of the Board of Estimate is directed at procedures which are asserted to be unresponsive, inconvenient or undemocratic. More often than not, the real objection is to the decision of the Board rather than to the method of achieving it.

The City Charter provides that the Board establish its own rules (Appendix B). It should be noted however that many rules are established by the Charter, Administrative Code, or other provisions of law.

Less evident than the formal rules of procedure are the processes preceding the public hearing. The control of the calendar, the initiation of calendar items and the informal decision processes must be understood to appreciate the seeming lack of controversy on the majority of Board of Estimate decisions. In theory, the public may have any communication, petition or resolution requiring action by the Board calendared by the Secretary. In practice, this route is rarely used, and "public" items on the calendar are generated by the members of the Board or by governmental agencies. Inherent in this practice is a selection process. In the case of agencies the process is subject to all the administrative constraints and delays that pertain to bureaucracy. It must, however, be understood that these processes serve a dual purpose. Obviously, the great majority of the issues before the Board are of negligible interest to the general public (contracts for overhauling a generator, purchase of accounting machines, consent to use city streets for burglar and fire alarm cables). Many of these mundane problems will have been the subject of sub-

stantive controversy as well as agency politics. Clearing the bureaucratic hurdles will tend to compromise the politics and clarify the substance, so that the Board usually receives the calendar item after the controversy has been resolved. One of the Board's effects, therefore, is to force the bureaucracy to come to grips with, and resolve, underlying controversies inherent in even mundane matters of city business. It is, in a very real sense, the political and ethical conscience of the bureaucracy.

The public interest in more prominent issues is also evident long before the Board of Estimate public hearing. Many items come to the calendar via hearings at the City Planning Commission, via presentation to the local Community Board, or after discussions with the affected Borough Presidents or city-wide member of the Board. It is not uncommon for civic groups and community organizations to direct major public relations efforts at the members of the Board well before an item appears on its calendar. In view of this, it is hardly surprising that the image of controversy at public hearings is often absent; needless to say, agreement or compromise underlie each of the Board's decisions.

There is also a selection process in the way other items arrive on the Board calendar. In the case of requests for services or supplies by city agencies, it is mayoral practice that they first be approved by the Mayor's office before they can be sent to the Secretary to be placed on the calendar. Petitions for franchises are now rerouted from the Secretary to the Director of Franchises, or are sent to him directly. The Director will then forward the request to the agency that will be affected (i.e. Department of Highways, Department of Buildings) and await their report.

He will tell the petitioner whether he will approve or disapprove it. Because of this process, certain franchise requests never reach the calendar itself, although the petitioner is entitled by law to have his request brought before the Board despite the disapproval of the Director of Franchises.

Similarly, items concerning the acquisition or sale of real property should be referred to the Acquisition and Disposition Committee for further referral to the Real Estate Department. In fact, the Committee has become an extension of the Department, which evaluates the request and, if approved, forwards it to the Secretary.

Individual members of the Board can also have items placed on the calendar by simply informing the Secretary. Before a Board member will place an item on the calendar, it will have undergone scrutiny by his personal staff, and will stand an excellent chance of being approved by the entire Board membership. Matters requiring Board approval also come from various other sources. These include: the City Planning Commission, the Director of the Budget, the Director of Real Estate (on matters concerning the disposition of property, the Department of Real Estate will first check with the various city agencies to see if they want to "hold" a particular parcel of land, and if not will automatically place it on the calendar), citizens and public bodies, and County and State officials. One power which the Board possesses is the ability to effectively delay taking action on any particular item on the calendar. The courts have already ruled, in the matter of Ungar (Wagner),[23] that a petitioner cannot insist that the Board hear his petition on a specified date, since it is discretionary with the Board when it will hear and determine petitions.

Once the calendar has been prepared by the Secretary, and usually on the day preceding the public meeting, the Board meets in executive session to discuss the items, to determine on which matters there is agreement, which matters require further study, and which, if any, are to be argued. Since a great number of the items appearing on the calendar have been laid over from previous sessions or are returning after having been referred to an agency, Board members will be well informed on the controversies involved, through briefings provided by their staffs and the different departmental reports. Those items on the calendar for the first time will generally be referred to the city agencies most affected for further information and/or approval. There are also a small number of communications, reports, etc., dealing with matters that have already been resolved, and these matters are merely filed. These are placed on the calendar *pro forma,* to acknowledge that they have been received by the Board.

The executive session, an informal and confidential meeting at which no record of the proceedings is taken, creates the optimum conditions for the Board to assert its unique role in the city's governmental process. In attendance are the members of the Board (or their deputies), the Secretary, the Director of Franchises, the Director of the Budget and representatives of the agencies with items on the calendar. The members will be briefed on the items and will reach quick agreement on a certain number of them. If there is some difficulty in reaching a concensus, the room may be cleared so that the members can discuss that particular item; this often enables the Board to find areas of agreement around which a compromise may be fashioned.

At these sessions, there are three alternatives available to the Board. It can decide on a unanimous vote (which

due to the previous selection process, occurs most often), or it can reach an agreement on a majority vote. This will occur where the entire Board agrees that an item should be moved, but one or more members have insurmountable objections or have received great pressure to vote in a particular fashion. Finally, they can agree to lay an item over or refer it back to an agency, which will generally occur when more information or expertise is required to reach a clear decision, or when there is public opposition to it. Each member by participating in the executive sessions is expected to hold on to his position at the public meeting and only the rare instance of new and persuasive testimony or an overwhelmingly negative public reaction will change the positions of the Board members after the executive session. In such instances, the Board has the option to lay the item over to a future session for consideration, after closing the hearing, or it may indeed lay the item over, but continue the hearing and invite more public testimony. It should be noted that certain items need a ⅔ or ¾ majority for approval, and that a unanimous vote is required to add something to the calendar (see Rules of Procedure, Appendix B).

While it is true that some form of agreement has been reached by the Board members at the executive sessions, the open meeting serves as a forum at which the general public can express their views on any of the items appearing on the calendar. Since items requiring an open hearing have to be advertised in the local press and the City Record several days before the hearing, the public has the opportunity to testify on matters concerning their community. The relatively low turnout for public hearings is primarily due to the nature of the bulk of the Board's business. The majority of decisions which the Board makes deal with matters of governmental rather than public controversy.

That is not to say that the citizens of the city do not arouse themselves when a particular interest is at stake. Pressure is exerted on individual Board members by community leaders, clergymen, and political personalities, through mailings and phone calls. Indeed, the appearances by partisans in the Corona and Forest Hills affairs vividly demonstrate what public pressure can accomplish when applied. Communities have also become much more sophisticated and increasingly aware of the power they can wield. Thomas Cuite, City Council majority leader, recently stated in the *New York Times* (March 19, 1973), "The local boards (Community Planning Boards) have developed good spokesmen, who know what they're talking about and who know that just standing around and screaming does not get bills passed." Whereas it is true that testimony before the Board is generally related to a narrow, local interest, the Board invites rather than rejects this comment and advice. Suggestions by good government groups, community organizations, etc., are always welcomed and often helpful. The opportunity exists for all individual citizens and groups to avail themselves of this forum and to raise relevant issues before the eight highest elected officials of the City of New York. The intensity of public reaction can, and does, affect the members of the Board.

Critics of the Board of Estimate's present procedures argue that the Board should not reach decisions in executive sessions prior to public hearing. Conceivably, the Charter could mandate that the Board adopt a decision at a meeting subsequent to the public hearing. Apart from the question of whether the Board's rules of procedures are an appropriate subject for the Charter, such a rule would serve to delay decisions on the overwhelming majority of items on which there is no controversy. Furthermore, since virtually all controversial items have previously been subject of public debate, this rule would be a dubious benefit even with regard to such items.

The Board of Estimate Calendars

The powers granted to the Board of Estimate by the City Charter, the Administrative Code, the General Municipal Law, the General City Law, and various State statutes fall into eight major categories. (See Appendix A.) The powers are:

1. Use of property of or for the city. This includes leasing out city owned property for private use, and leasing privately owned real property for city use.
2. The purchase or sale of any real property on behalf of the city.
3. The right to award franchises and revocable consents on behalf of the city. This includes new bus routes, sidewalk cafes, cable television, bridges, tunnels, pipes, and conduits.
4. Granting relief from public letting for purchases and contracts made with the city.
5. Public improvements in the city.
6. Changes in the city map, including street line modifications, street closings, grading of sidewalks and roads, and changing zoning regulations and restrictions.
7. All matters dealing with budgetary and financial matters, such as the expense and capital budgets, tax abatement and relief, rent increases, and

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awards to Police and Fire Department employees killed or injured in the line of duty.

8. Other miscellaneous items such as the disposal of obsolete records belonging to city agencies, and various communications brought to the Board for administrative action.

A detailed analysis was made of the calendar items coming before the Board during six of its semi-monthly meetings. The examined meetings took place on January 14, January 28, February 11, March 11, July 22, and November 11, 1971. A total of 1,703 calendar items were examined.

This examination was undertaken to determine: a) whether the powers accorded the Board by the City Charter were being used by the Board, and whether the Board was acting on items which were not in its jurisdiction; b) how the different items coming before the Board were voted upon; and, c) the extent of public appearances before the Board in support or opposition to an item.

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Analysis of Board of Estimate Calendars

Legend:

Calendars Used:

A.—January 14, 1971.

B.—January 28, 1971.

C.—February 11, 1971.

D.—March 11, 1971.

E.—July 22, 1971.

F.—November 11, 1971.

Powers of the Board of Estimate.

1. Use of real property of/for city.
2. Acquisition/disposition of property.
3. Franchises and revocable consents.
4. Contracts.
5. Public improvements.
6. Planning and zoning.
7. Budget and finance.
8. Other items.

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TABLE "A"

Breakdown of each calendar

Calendar A—January 14, 1971

	1.	2.	3.	4.	5.	6.	7.	8.	Total
Unanimous	37	43	6	41	0	15	13	1	156
Majority	0	0	0	26	0	0	0	0	26*
Laid over	8	5	6	0	2	12	3	1	37
Referred	1	1	5	22	1	5	0	0	35
Filed	1	2	2	9	0	3	5	1	23
Withdrawn	0	0	0	3	0	0	0	0	3
	47	51	19	101	3	35	21	3	280

Calendar B—January 28, 1971

	1.	2.	3.	4.	5.	6.	7.	8.	Total
Unanimous	39	21	5	17	2	11	10	1	106
Majority	0	1	0	0	0	0	0	0	1
Laid over	9	3	5	1	0	7	3	1	29
Referred	0	1	8	9	0	3	7	0	28
Filed	0	8	2	2	0	5	8	0	25
Withdrawn	0	0	0	0	0	0	0	0	0
	48	34	20	29	2	26	28	2	189

* Twenty-two of these items were considered under the Ghetto Medicine Act (Section 967 of the Public Health Law, Laws of 1968.)

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TABLE "B"

Breakdown of each calendar

Calendar C—February 11, 1971

	1.	2.	3.	4.	5.	6.	7.	8.	Total
Unanimous	39	21	3	26	1	17	77	1	185
Majority	0	0	0	1	0	1	1	1	4
Laid over	12	4	2	0	0	8	6	0	32
Referred	2	1	2	16	0	4	2	1	28
Filed	0	1	0	6	0	0	3	1	11
Withdrawn	0	0	0	0	0	0	0	0	0
	53	27	7	49	1	30	89	4	260

Calendar D—March 11, 1971

	1.	2.	3.	4.	5.	6.	7.	8.	Total
Unanimous	36	27	7	22	0	18	15	6	131
Majority	0	0	0	0	0	0	1	0	1
Laid over	12	2	6	2	0	14	11	1	48
Referred	2	1	10	39	0	14	7	0	73
Filed	1	8	6	2	0	4	6	1	28
Withdrawn	0	0	1	0	0	0	0	0	1
	51	38	30	65	0	50	40	8	282

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TABLE "C"

Breakdown of each calendar

Calendar E—July 22, 1971

	1.	2.	3.	4.	5.	6.	7.	8.	TOTAL
Unanimous	43	49	18	55	0	28	17	9	219
Majority	0	1	0	2	0	3	0	0	6
Laid over	8	13	0	6	1	20	9	0	57
Referred	5	2	25	57	0	8	8	1	106
Filed	3	12	7	2	0	6	11	3	44
Withdrawn	0	0	0	0	0	0	0	0	0
	59	77	50	122	1	65	45	13	432

Calendar F—November 11, 1971

	1.	2.	3.	4.	5.	6.	7.	8.	TOTAL
Unanimous	18	21	5	50	0	9	56	0	159
Majority	0	1	0	9	0	1	1	1	13
Laid over	6	5	2	11	0	13	8	0	45
Referred	0	3	3	4	0	1	19	1	31
Filed	1	1	2	2	0	1	3	1	11
Withdrawn	0	0	0	1	0	0	0	0	1
	25	31	12	77	0	25	87	3	260

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Distribution of Powers

An analysis of the six studied calendars (Table D) demonstrates that 26.0% of the items dealt with contracts, 18.2% of the items dealt with budget and finance, 16.6% of the items dealt with the use of real property of/for the city, 15.1% concerned the acquisition or disposal of city property, 13.4% concerned planning and zoning, 8.1% dealt with franchises and revocable consents, 0.6% dealt with public improvements, and 2.0% were "other items." The low figure for public improvements is not truly indicative of the Board's involvement in these matters. Although the Board of Estimate is empowered by the City Charter (Section 230.e) to undertake improvements and repairs of sidewalks, etc., it was found that the majority of these items also required some kind of budgetary or zoning action. Therefore, most of the items for public improvements are handled through the Board's power over zoning and the budget.

Only 33 items out of the 1,703 examined fell into the "all other" category. Minor regulations in the Administrative Code and the Rules of the Board of Estimate empowered the Board to act on the vast majority of these diverse items. It only one case (Item 248, Calendar D) was the Board not directly empowered to act. This item concerned an agreement for the exchange of easements for a subway entrance between four different parties. The request was made to the Mayor's Office, but it was his belief (expressed by the Corporation Counsel) that the Board of Estimate should resolve the matter. Despite this one example, it is clear that the Board exercises its power only through explicit statutory authorization. Surprisingly, in not a single instance among the items examined, did the

CALENDAR D—March 11, 1971

No. 248

R-9433

RESOLUTION for adoption, recommended by the Director of the Budget, the proposal to approve and accept an agreement between Fisher Brothers 47th Company, the City of New York, the New York City Transit Authority and Owners of property located at the south-west corner of West 47th Street and Avenue of the Americas, Manhattan, for the exchange of easements for a subway entrance to the 47th-50th Streets—Rockefeller Center Station of the New York City Transit System.

REPORT of the Director of the Budget, dated February 23, 1971 stating that, although this request was presented to the Office of the Mayor for approval, it is the opinion of the Budget Director's Office, and concurred in by the Office of the Corporation Counsel, that this request for approval is more properly within the jurisdiction of the Board of Estimate and is therefore submitted for such approval.

Under an existing agreement with the City dated March 22, 1938, the Owner has the right to relocate the existing subway entrance, which was constructed through the building on the premises, to another location on the premises, subject to the consent of the Board of Estimate. The building on the premises has been demolished and a new building is being constructed thereon. The subway entrance has been temporarily relocated in the sidewalk of Avenue of the Americas. It will be permanently relocated within the new building.

The proposed agreement provides for the construction and maintenance of the new subway entrance by Fisher Brothers 47 Company, a limited partnership, which is the lessee of the premises for a term of 50 years with an option to renew for an additional 25 years. The Lessee will provide liability insurance and will deposit $50,000 as security for the performance of the work. The work is to be completed within 18 months from the commencement of the construction of the building and all work must conform to plans approved by the Chief Engineer of the Transit Authority. The Owner assumes the rights and obligations of the Lessee whenever there is no lease in effect requiring the lessee to perform the obligations imposed by the agreement.

Note: Agreement not received.

Resolution for adoption.

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Board exercise a power gained under the "residual powers" clause, which it had until 1963. In fact, throughout our research, only one power was discovered which the Board had assumed, and which had not been specifically assigned to it. This dealt with the power to make loans for middle-income housing. "The unvaried practice has been for the Board to approve the amount of City loans, and the Legislature may be presumed to have been aware of the practice when it passed the HDC Act. Whether the Legislature intended, without saying so, that the Board should also approve the amount of HDC loans depends on the reason for the practice with respect to City loans and the applicability or non-applicability of the same rationale to HDC loans.

"The predecessor sections of Article 2 (Private Housing Financial Law) were first enacted in 1955. They empowered both the State and the City to make Mitchell-Lama loans and contemplated such loans by private institutions. Then, as now, there was no provision for any approval of the amount of a loan, whatever its source. It seems reasonable to infer that the Legislature envisaged that the body making a loan and providing the funds would determine the amount thereof, in accordance with whatever general provisions of law were applicable to that body. That is, with respect to a City loan, the Charter would dictate the necessary procedures. At that time the 1938 Charter was in effect. It said nothing about which agency or official would make City loans for middle-income housing but did vest in the Board all residual powers of the City. By virtue of these powers, it was the Board itself which actually made City loans for this purpose the Board was the City. When the 1963 Charter vested the residual powers in the Mayor, Board approval of the loans con-

tinued to be sought even though the power to make the loans lay with the Mayor. Mayoral acquiescence in this practice may be interpreted as recognition of the Board's concern with actions which can have an impact on the City's constitutional debt-incurring powers and, therefore, on the capital budget. However, it would be a *non sequitur* to conclude from this practice, or from presumed legislative awareness of it, that the Legislature intended *sub silentio* to read into the statute a requirement that the Board pass on the amount of loans made from other than City funds."[24]

TABLE "D"

Breakdown of Calendars According to Distribution of Powers

All Calendars

	A.	B.	C.	D.	E.	F.
1.	47	48	53	51	59	25
2.	51	34	27	38	77	31
3.	19	20	7	30	50	12
4.	101	29	49	65	122	77
5.	3	2	1	0	1	0
6.	35	26	30	50	65	25
7.	21	28	89	40	45	87
8.	3	2	4	8	13	3
Total No. Items Per Calendar	280	189	260	282	432	260

TOTALS

1. Use of real property of/for city. – 283 items = 16.6%
2. Acquisition/disposition of property. – 285 items = 15.1%
3. Franchises and revocable consents. – 138 items = 8.1%
4. Contracts. – 443 items = 26.0%
5. Public improvements – 7 items = 0.6%
6. Planning and zoning. – 231 items = 13.4%
7. Budget and finance. – 310 items = 18.2%
8. Other items. – 33 items = 2.0%

TOTAL ITEMS CONSIDERED — 1703

Exhibit A Annexed to the Affidavit of Werner Kramarsky

Voting Analysis

An examination of the six calendars under discussion (Table E) demonstrated that 56.1% of the items passed by a unanimous vote 17.6% of the items were referred, 14.6% were laid over, 8.3% were filed, 3.1% were passed by a majority vote, and 0.3% were withdrawn. The 56.1% figure is not an accurate indication of the degree of unanimity on Board votes. In effect, 40.8% of the items appearing on the calendar are laid over to be voted upon at some future time. Items are referred to a bureau or committee for further information, filed away, withdrawn from the calendar altogether, or just laid over.

A truer indication of the Board of Estimate's unanimity is shown by examining only those items on which a vote was taken. The Board reached a decision on 1,007 (59.2%*) of the calendar items studied; and among these items, 94.8% were passed unanimously.

This high degree of unanimity is one of the most striking aspects, adds further substance to the argument that negotiations, of which there is no substantive proof, have taken place before the public meeting. Also, based on the high degree of unanimity, one must conclude that Board members have made their decision before appearing at the public meeting. In addition, only 42 of the 1,008 items were amended or modified before being passed by the Board.

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* A study undertaken by the Moore Charter Revision Commission in 1960 showed that a decision was reached on 62% of the items appearing on the Calendars. The unanimity figure in the 1960 study was 99.5%, nearly 5% higher than in the present analysis. The fact that there is slightly less unanimity at present could be explained by several factors: the different political make-up of the Board, the different personalities involved, and public awareness of the pressures that can be brought to bear.

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TABLE "E"

Breakdown of Calendars According to Votes on the Items

All Calendars

	A.	B.	C.	D.	E.	F.
Unanimous	156	106	185	131	219	159
Majority	26*	1	4	1	6	13
Laid over	37	29	32	48	57	45
Referred	35	28	28	73	106	31
Filed	23	25	11	28	44	11
Withdrawn	3	0	0	1	0	1
Total number of items	280	189	260	282	432	260

* Twenty-two of these items were considered under the Ghetto Medicine Act.

Totals

Unanimous vote	— 956	= 56.1%
Majority vote	— 51	= 3.1%
Laid over items	— 248	= 14.6%
Referred items	— 301	= 17.6%
Filed items	— 142	= 8.3%
Withdrawn items	— 5	= 0.3%

Total number of items considered — 1703

Controversial Issues

Although only 5.2% of all the calendar items on which the Board took action were passed by a majority instead of unanimously, an examination of the categories (Table F) shows that 74.5% of these majority votes concerned contracts. Specifically, 43.1% of the majority votes dealt with Ghetto Medicine contracts. Planning matters constituted 10% of the majority votes, budget 6%, acquisition and disposal of city property 6%, and "Other Matters" 4%. If the number of majority votes is an indication of the controversiality of the items before the Board, then one would have to conclude that contracts and planning are the most important matters decided by the Board.

This conclusion is born out by an examination of the items which prompted members of the public to appear before the Board (Table H). Some 41.8% of all public testimony before the Board concerned contracts, 26.6% of the public appearances concerned planning and zoning, 11.4% were for acquisition and disposal of city property, 7.6% for both budget and use of real property of/for the city, 3.4% for franchises and revocable consents and 1.2% for public improvements.

More significantly, however, is the fact that although the public made appearances before the Board on only 4.6% of the calendar items (7.8% if only the voted items are considered), 54.9% of the majority votes came on issues where public testimony had been heard.

In addition, 20% of the items withdrawn came after public testimony, compared with an overall withdrawal rate of 0.3%. Some 19% of the items were laid over after public appearances, whereas 14.5% of all items in general were laid over. (See Tables E & G.) One could safely con-

clude, on the basis of base figures, that public testimony (which may in itself be a measure of controversialism) has a significant effect on the actions of the Board.

The 1960 Moore Commission Study found that the public testified before the Board on only 6.0% of the items (comparable to the present rate of 4.6%). It would appear that the number of people now taking advantage of the public forum that the Board of Estimate provides has not changed substantially since 1960.

Exhibit A Annexed to the Affidavit of Werner Kramarsky

TABLE "F"

Breakdown of Votes According to Board Powers

	Un.	Maj.	La. Ov.	Ref.	File	With.
1. Use of prop.	212	0	55	10	6	0
2. Acq./dis.	182	3	32	9	32	0
3. Franchises	44	0	21	53	19	1
4. Contracts	211	38*	20	147	23	4
5. Pub. Improv.	3	0	3	1	0	0
6. Planning	98	5	74	35	19	0
7. Budget	188	3	40	43	36	0
8. Other	18	2	3	3	7	0

* Twenty-two of these items were considered under the Ghetto Medicine Act.

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TABLE "G"

Public Testimony Before the Board

Appearances by members of the public and subsequent action taken:

Calendar

A. 27 items (4 by unanimous vote; 22* by a majority; 1 laid over.)

B. 6 items (6 by unanimous vote.)

C. 6 items (2 by unanimous vote; 1 by a majority; 3 laid over.)

D. 6 items (1 by unanimous vote; 5 laid over.)

E. 14 items (7 by unanimous vote; 4 by a majority; 3 laid over.)

F. 20 items (15 by unanimous vote; 1 by a majority; 3 laid over; 1 withdrawn.)

Total number of items on which appearances were made—79

Breakdown

By unanimous vote—35 items.

By majority vote —28 items of which 22 were Ghetto items.

Laid over —15 items.

Withdrawn — 1 item.

* These items were under the Ghetto Medicine Act.

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TABLE "H"

Breakdown of Appearances Before the Board

Number of appearances pertaining to:

1. Use of real property of/for the city	— 6 items.
2. Acquisition/disposition of property	— 9 items.
3. Franchises and revocable consents	— 3 items.
4. Contracts	—33 items.*
5. Public improvements	— 1 item.
6. Planning and zoning	—21 items.
7. Budget and finance	— 6 items.
8. Other items	— 0 items.

* Twenty-two of these items were under the Ghetto Medicine Act.

Exhibit A Annexed to the Affidavit of Werner Kramarsky

Powers and Functions of the Board of Estimate

a) Should the Board have the power to lease out city owned property or rent real property for city use?

The Board of Estimate may "grant leases of city property and concessions for the use of city property and enter into leases of property to the city for city use." (Charter, Section 67.1) It also holds a variety of subsidiary, if infrequently exercised, powers in this area, such as the granting of locations to the Fire Department (Administrative Code, Section 67(2)(2.0), or the power to designate any building in the city a common jail (Administrative Code, Section 67(2)(3.0), or any city owned property as a central live poultry market (Agriculture and Markets Law, Section 267a). Most of the Board's decisions in this category, nevertheless, fall under its general jurisdiction over uses of property by the city government, either as a lessor or lessee.

Although the Board holds the power of final decision in these matters, the Department of Real Estate is at the center of the process. This department was created in 1959 to replace the old Bureau of Real Estate, an agency of the Board of Estimate. The Commissioner of Real Estate is now appointed by the Mayor. At the Board's direction, the Department of Real Estate investigates any proposed lease or other use of city property and reports to the Board as to whether or not such use of city property is in the public interest. In the vast majority of cases, the Board follows the Department's recommendations.

Item Number 37 on the Board's January 28, 1971 calendar is a typical request by a city agency for Board approval of its rental of building space. In this item the Department of Real Estate recommended approval of the

CALENDAR B—January 28, 1971

No. 36

R-12891

IN THE MATTER of a report of the Commissioner of Real Estate, dated April 20, 1971 authorizing a lease for use by the Health Department as a Methadone Clinic, space in the building at 90-16 Rockaway Beach Boulevard, Queens, for five years at annual rental of $4,500 for the first two years, and $4,800 for the last three years.

On April 22, 1971 (Cal. No. 404) and May 20, 1971 (Cal. No. 453) and June 17, 1971 this matter was laid over; on the latter date (Cal. No. 52) to this meeting.

For consideration—one resolution.

CALENDAR E—July 22, 1971

No. 37

R-11996

RESOLUTION for consideration, recommended by the Commissioner of Real Estate, authorizing the payment of rent on a month-to-month basis, without the necessity of a lease for a period not to exceed one year from February 17, 1971 for 4,800 square feet of floor space at 53 Worth Street, Manhattan for use by the Department of Personnel at a rental at the rate of $20,000 per annum (Committee Cal. No. 48).

REPORT of the Commissioner of Real Estate, dated January 12, 1971, stating that the Department of Personnel has requested that they be permitted to continue to occupy the premises on a month-to-month basis, since they intend to move this facility to 40 Worth Street, when space is available there.

This tenancy would be at the same rent and on the same terms and conditions that govern the present occupancy of the premises.

For consideration—one resolution.

Exhibit A Annexed to the Affidavit of Werner Kramarsky

location and the amount of the rent, and the Board approved the "nonlease" rental unanimously.

But not all such items are so easily decided. The location of methadone clinics, for example, often ignites community conflict. Few quarrel with the goals of addiction treatment, control and rehabilitation, but many citizens oppose the placement of such clinics within their own communities. The expressed fears of increasing "addict" traffic, deteriorating property values, etc., are major obstacles to the establishment of such centers.

The disposition of Item Number 36 on the July 22, 1971 calendar is a case in point. After three appearances on the calendar the resolution was "referred back" to the Department of Real Estate.*

Day care center leases also provide the Board of Estimate with opportunities for social policy direction. Since most communities desire the establishment of such centers, the Board can act quickly (as it usually does.) It should be noted, however, that Board members may demand, even insist, that the Department of Social Services agree to provide similar services in other parts of the city as the

* The history of this item is noteworthy in that it indicates how effectively local pressures can affect the decisions made by the Board of Estimate. This item was originally placed on the calendar on April 22, 1971. It was an addition to the prepared calendar at the request of the Mayor's office, which would mean that it was a matter of some urgency. According to the New York City Department of Health, there was very strong community opposition to the placing of a methadone clinic in that area, and although there is no substantive proof of this by reading the record of the Board meetings, it is evidenced by the fact that it was laid over three times and finally referred back to the Department of Real Estate. This is one method of denying authorization. A recent telephone call to the Health Department informed us that local opposition to a methadone center in that area was still great. As late as March, 1973, no alternative location had achieved even the status of referral to the Department of Real Estate.

price of agreement to the departmental policies and priorities.

It is in these under-exposed negotiations that the Board of Estimate provides the balance between executive decision and public need. The Charter must assign such jurisdiction in entirety if the function is to continue.

If one were to remove jurisdiction over city property from the Board of Estimate, one could relocate it in several places. One would be the Department of Real Estate. The Department of Real Estate has the facilities and the expertise to handle such matters, possibly more expeditiously than the Board. Such centralization, however, would come at the expense of review by elected officials, a necessary ingredient in the settling of controversial questions.

Another alternative, delegation of these powers to Community Boards, would possibly heighten local involvement, at least on some questions. However, the great majority of leases negotiated for the city are of little interest to the general public. There are some publicly recognized uses that generate interest in the lease contracts before the Board of Estimate. The examples used in this discussion, a methadone maintenance clinic and a senior citizens recreational facility, are deliberately chosen for their position at the extremes of community desirability.

The present procedure for initiating a lease between the city and a private landlord is for an agency—the Department of Health in the case of the methadone maintenance clinic, and the Model Cities Administration or the Department of Social Services for the senior citizens recreational center—to select a location and then ask the Board of Estimate, through the Department of Real Estate, to approve the site and the proposed lease.

Local initiative in either situation would usually be a voluntary agency which may or may not have a base in

the community. Ordinarily, the operation of these types of facilities requires the resources and skills of a voluntary agency. The charitable groups are, of course, quite expert in proposing programs to city agencies and elected officials. There is little question that such organizations can, and do, petition Community Boards and Borough Presidents.

The need for such facilities is generally easily demonstrable, but local public support for any drug addiction related program is virtually non-existent. The arguments against the establishment of such programs are: 1) another community has more addicts, and 2) the establishment of such a facility will draw addicts to this locality.

The creation of senior citizen services in leased space is almost always supported. It is seen as a "stabilizing" influence, a no-cost added city service, and as a provider of "premium" para-professional employment opportunities in the neighborhood.

While more leeway might be given to the local boards in initiating requests, it should be understood that in nine out of ten instances, leases proposed by the Department of Real Estate deal with matters such as finding office space for various city agencies and are of no interest to the average citizen. The Charter has always stated that the Board of Estimate has the power to "enter into leases of property to the city for city use." (Charter, Section 67.1) Since leases are signed on behalf of the city, the final decision should, naturally, be made by a central body representative of the city as a whole. In fact, the ability of public bodies to delegate power is severely restricted by state statutes, and the courts could easily rule that, absent new state law, the power to enter into leases *must* be exercised by the city as a whole.

Local review would be welcome in deciding whether or not a clinic or a center was necessary in the district and

on site selection. However, review of the economic terms and conditions of a proposed lease would require substantial duplication of the staff of the Department of Real Estate.

There is now ample opportunity for communities to "review" and even in certain instances to "veto" proposals made by the city. Using the specific item of the methadone maintenance clinic, the Department of Health has confirmed that for the past two years community opposition has prevented a methadone clinic from being located in Far Rockaway. Here is a clear example of the residents of a district succeeding against a city agency. If this were carried out on a large scale, the city would become ungoverned because policy matters of city-wide importance could be stymied by local resistance. The success of the residents of Far Rockaway in pressuring their Councilman, Borough President, etc., indicates that a district can have its wishes acceded to.

If a decision were made to give local bodies powers of "review" and "veto" over proposed leases, the city would have to provide independent staffing and expertise for each district, and would have to create facilities equal to those of the Department of Real Estate in each borough. Whatever gains would be made by involving the community more intimately in the matter of making leases would probably be offset by the higher taxes which would have to be imposed to support the increased staff.

In summation, community board initiation of leases subject to Board of Estimate approval would appear to be feasible. A formal requirement for community board review of leases with respect to local needs and site location would be consistent with current practice. However, local board veto would substantially impair the city's ability to carry out city-wide policies.

Leaving final responsibility with the Board of Estimate represents a middle way, a check upon the potential insularity of the Department of Real Estate and a balance of community interests when they conflict. It combines professional judgment with a forum for community opinion. The *Draft of Proposed Charter for the City of New York* by the New York State Commission on Governmental Operations of the City of New York (1960 Moore Commission), a document which drastically reduced the powers of the Board of Estimate (Development Board), retained control of city property in its hands.

b) Should the Board have the responsibility for the disposal of city property?

Closely related to the power to lease out property of the city and designate property for city use, the Charter also states that no real property of the city may be disposed of except with the approval of the Board of Estimate unless the power is expressly vested in another agency. (Charter, Section 384a & b)

The Board has expressly set up the Committee for Acquisition and Disposition, (Rules of Procedure, No. 19 b.) composed of the three city-wide elected officials, to be in charge of these matters and to place the request on the calendar. In practice though, it is the Department of Real Estate which determines whether or not a piece of property should be sold or auctioner and sets a base price. The Department's recommendation is then passed on to the Committee, which generally accepts it without alteration and then submits it to the Board Secretary for calendaring.

Item Number 77 (Calendar D) is an example of the sale of several parcels of land at public auction. The item had been laid over twice previously because a city agency

CALENDAR D—March 11, 1971

No. 77

R-11993

RESOLUTIONS (2) for consideration, recommended by the Commissioner of Real Estate, as follows (Committee Cal. No. 2):

(a) Authorizing the sale at public auction of eleven parcels of land in the Borough of Manhattan at the minimum prices enumerated in the resolution.

(b) Authorizing the payment of brokers commissions on those parcels sold for $1,000 or more.

REPORT of the Commissioner of Real Estate, dated January 11, 1971, stating that the total assessed valuation of these parcels is $278,000. The minimum or upset prices total $204,500.

No City Agency has indicated a need for the parcels.

On January 19, 1971 (Cal. No. 45) the Committee laid this matter over to its meeting of February 2, 1971, and on the latter date (Cal. No. 5) to this meeting.

For consideration—two resolutions.

Exhibit A Annexed to the Affidavit of Werner Kramarsky

indicated that it might have a use for one or more parcels in the group to be sold. However, on this occasion, the third time the matter was brought up, it was passed unanimously. This once again demonstrates how most of the controversy inherent in an item is resolved by internal processes before the matter is actually voted upon by the Board.

The process of acquiring real property for public purposes may be even more complex the Board is placed in the position of tacitly approving or disapproving agency activities proposed for the site by determining whether or not the site is to be acquired. Urban renewal projects are often examples of this point. As in Item Number 14 (Calendar C), the Housing and Development Administration may propose acquisition of a site which the agency considers suitable for urban renewal. This step is taken to implement an urban renewal plan previously approved by the Board of Estimate. Before the Board acts it considers the recommendation of the City Planning Commission, the local Community Board, and other agencies and/or citizens with an interest in the matter. In this particular instance, the Board heard statements from the Economic Development Administration, the Community Board, several block associations, the Urban Task Force, and property owners in the area, as well as some other local civic organizations. Obviously the Board's decision (in this instance approval by a vote of 22 - 0) may well have been determined as much by its opinion of the proposed use of the site as by the existing condition of the property. Thus, the existence of the Board forces city agencies to make decisions which are compatible with the Borough Presidents' more parochial points of view.

CALENDAR C—February 11, 1971

No. 14

R-4218, 4232

PUBLIC HEARING in the matter of a communication dated January 13, 1971, from the Administrator, Housing and Development Administration, submitting proposed resolutions and report of the City Planning Commission (CP-21415, dated January 11, 1971), relative to the Gowanus Industrial Urban Renewal Project within the area bounded generally by First Street, Fourth Avenue, Seventh Street, Second Avenue, etc., Borough of Brooklyn.

ADDITIONAL COMMUNICATION dated January 14, 1971, from the Administrator, Housing and Development Administration, submitting the Urban Renewal Plan for the proposed Gowanus Industrial Urban Renewal Project, Borough of Brooklyn.

This matter has been duly advertised in accordance with a resolution adopted by the Board on January 28, 1971 (Cal. No. 100).

REPORT of the City Planning Commission (CP-21415, dated January 11, 1971),

stating that the Gowanus Industrial Development Plan provides for the renewal of a deteriorating area, located in the Gowanus Canal vicinity, as an urban renewal project.

The Plan is intended "to minimize the non-conformance of land use by the removal of substandard and deteriorating non-industrial structures from a zoned industrial area; the elimination of impediments to land disposition and development; the creation of job opportunities for residents of nearby neighborhoods; the provision of a relocation resource for industries displaced from urban renewal areas; and the establishment of appropriate industrial land uses to strengthen and support the area's industrial character."

The proposed Renewal Area is bounded by 1st Street, 4th Avenue, 7th Street, 3rd Avenue, 16th Street, Hamilton Avenue, Smith Street, 4th Street and Bond Street, Borough of Brooklyn.

Redevelopment of the area is proposed to be advanced in stages. The following parcels are proposed to be acquired in the First Stage:

Block	Lot
967	24
972	1
1025	1
	16
	26
	52
	43
	46
	47
	49
1038	1
	6
	35
	34
	33
1031	1
	9
	11
	41
	52
	53
	54
	62
	67
	70
	71
	72
	75
	78

Block	Lot
	79
	80
	82

The following parcels within the boundaries of the renewal area are designated Q parcels, not proposed to be acquired; but subject to acquisition in the event that they do not comply with existing laws, codes, ordinances and regulations of the City and State of New York.

Block	Lot
1020	1
1007	1, 118, 220, 172, 219
979	31
967	1
968A	1
980	95
990	69, 65, 50, 138, 151, 153, 160, 1, 16

It is understood that before any additional property, not in Stage I, is to be acquired, amendments to the Plan to provide for such acquisition will be submitted to the City Planning Commission for approval.

The Plan indicates the elimination of a number of streets and states that streets are to be demapped as required. Such street closings will require a change in the City Map subject to approval by the City Planning Commission and Board of Estimate after public hearings in accordance with City Charter requirements.

Public Hearing.

Speakers in favor of the plan included representatives of the Economic Development Administration, Community Planning Board No. 6, Second Place Block Association, Nelson Street Block Association, the Urban Task Force, and property owners in the area.

The president of the South Brooklyn Development Council spoke in favor of the plan, but recommended the exclusion of certain properties and a traffic study to route traffic away from the residential area. The representative of the Cobble Hill Association endorsed the Council's position.

Owners of certain parcels in the area opposed the taking of their property.

Consideration

The City Planning Commission has carefully reviewed this Plan and given thorough consideration to the views expressed at the Public Hearing. While we consider this Plan to be generally appropriate for the revitalization of an industrial area to provide for suitable development which would increase urgently needed job opportunities in this section of Brooklyn, we consider that the Plan should be modified by the exclusion of certain areas.

The City Planning Commission, therefore, hereby modifies the Plan by eliminating the following areas for the reasons noted.

The area bounded by 4th Street, Bond Street, Gowanus Canal, West 9th Street and Smith Street is eliminated because this site is being considered as the site for a high school. The site is zoned for manufacturing. In fact, construction has already started on

part of the site. We make no determination at this time whether this site should be used as a school or for manufacturing purposes. Our action should not be construed as implying support for the school or for the existing manufacturing plans.

The following areas are excluded because they are largely occupied by residential development in satisfactory condition:

(1) The blocks bounded by 2nd Avenue, 8th Street, 3rd Avenue and Hamilton Avenue;

(2) The portion of the block between 6th and 7th Streets and between 3rd and 4th Avenues, easterly from the east line of Lots 1 and 5, to 4th Avenue. The excluded lots are: Block 992, Lots 21, 23, 24, 26, 27, 29, 30, 32, 33, 34, 36, 37, 38, 40, 42, 47, 48, 49, 50, 51, 52 and 53.

Findings and Approval

The City Planning Commission finds that the proposed Urban Renewal Plan, as modified, is an appropriate plan for the area involved.

The City Planning Commission hereby certifies that the Urban Renewal Plan for the Gowanus Industrial Development Area, as modified complies with the provisions of Section 502, Article 15 of the General Municipal Law of the State of New York and conforms to the Comprehensive Community Plan for the development of the municipality as a whole and is consistent with local objectives.

The Commission hereby certifies that the Urban Renewal Plan, as modified, is in conformity with the findings and designation of the Gowanus Urban Renewal Area under Section 504, Article 15 of the General Municipal Law as adopted by the City Planning Commission on January 11, 1971 (CP-21414).

The City Planning Commission hereby certifies its unqualified approval of the Urban Renewal Plan for the Gowanus Urban Renewal Area, as modified, pursuant to Section 505, Article 15 of the General Municipal Law of the State of New York.

Close the hearing.

Resolution for adoption approving the Urban Renewal Plan, etc.

Above all, in matters concerning the disposal of property, the Board serves as the protector of the city-wide interests by lifting such matters above the neighborhood interests when necessary for the welfare of the city as a whole. If matters such as these were finally decided at the local level, it is difficult to see how city-wide interests could be given just consideration. It is predictable that while many people may recognize the need for new sewage treatment plants or new sanitation garages, the neighborhoods which are served by the facilities would, conceivably, refuse to provide the property. Nearly everyone would prefer to site such facilities several blocks away from his home, perhaps just across the line into the next community. It is therefore essential that a centralized body be empowered to resolve these matters from a city-wide overview.

The Board of Estimate has retained the power to acquire and dispose of real property for the city throughout its history, periodic power shifts and charter revisions notwithstanding. The reason for this lies in the unique nature of the Board's perspective, which is derived from its composition. With the Mayor, the President of the City Council, and the Comptroller (the members of the Committee for Acquisition and Disposition) each having four votes in the Board, they provide the balance of legislative and executive weight for city-wide constituencies. With the votes of the Borough Presidents representing the individual borough and community constituencies, the distribution is well balanced. No other body in the city can claim this perspective.

c) Should the power to grant franchises and revocable consents be exclusive with the Board?

The Board of Estimate's control over the granting of franchises stems from the jurisdiction over the area on, above, and below all city streets and thoroughfares. Private bus firms must obtain franchises in order to operate, and the Transit Authority must receive Board approval for any changes in bus or subway routes. Companies supplying refrigeration or steam must obtain the permission of the Board to use certain conduits beneath the streets, as must any potential user of such conduits, pipelines or tunnels, including CATV concerns. No restaurant may open a sidewalk cafe without the Board's revocable consent. (Charter, Section 362)

The Board's ruling on franchises and revocable consents is vital, but not final; no franchise or consent can become effective until it has received the Mayor's signature.* The focus of the entire process is the Bureau of Franchises, the Director of which is an appointee of the Board. All petitions for franchises and requests for consents are routed to his office, at which point he sends the request to all city agencies which might have an interest in it for their comments or objections (these being advisory only). After receiving their replies, he makes his own evaluation and determines a fee, which is ordinarily a standard one. The request, with his recommendation and possible modifications, then comes before the Board and is generally approved, though delays are not uncommon. Petitions are rarely approved without the Director of Franchie's recom-

* Franchises must be approved by a 3/4 vote and revocable consents, by a majority. (Charter, Section 372) There is at present no provision in the Charter to override the Mayor's veto. (Charter, Section 373)

mendation, although a petitioner does have the right to put his request directly on the Board's calendar. In the calendars under study, however, there were no examples of this, since there is an informal recognition that the Director's opinion is too influential to be disregarded.

The operations of private bus companies are very much in the public interest, so the Board not only approves their franchises, but also consents to their routes and rate structures. Item Number 127 (Calendar A) is a request by such a firm for approval of an increase in fares. The Board must balance the public's desire for the lowest possible rates with the company's ability to each a reasonable rate of return. The solvency of the company is in everybody's interest. This particular item is not before the Board for a final decision, but for the fixing of a date for a public hearing. Final decision must take into account a thorough evaluation of the company's financial situation, along with the expressed desires of interested citizens.

Item Number 124 (Calendar A) is a representative petition for a revocable consent to continue using a tunnel under city streets. The Bureau of Franchises has solicited the opinions of all affected city agencies and determined the annual compensation to be paid by the petitioner. This action accentuates the Bureau's dual role as a clearing house for all relevant opinions in the city government and as an independent judge of the proper financial compensation. The item in question is technical and of a limited interest, but the security of city property and the possibility of financial abuse requires a body to review its decision, which the Board does.

Petitions for the construction of sidewalk cafes are in the same category. A generally innocuous item, there are still the matters of pedestrian safety and convenience, as

No. 124

R-9118

RESOLUTION for adoption, recommended by the Director of Franchises, granting consent to J. W. Mays, Inc. to continue to maintain and use a tunnel under and across Livingston Street between Bond Street and Elm Place, Borough of Brooklyn.

On December 3, 1970 (Cal. No. 134) this matter was referred to the Bureau of Franchises.

REPORT of the Director of Franchises dated January 4, 1971 stating that the tunnel has been in existence for over sixty years. The President of the Borough of Brooklyn, the Department of Water Resources, Bureau of Water Supply and Bureau of Water Pollution Control, the Department of Highways and the Bureau of Gas and Electricity state that they have no objections to the renewal of the consent.

The Office of the Comptroller of The City of New York advises that compensation at the rate of $833 per annum has been paid to June 30, 1971 and that security in the sum of $2,500 is maintained on deposit in his office.

The Bureau of Franchises has no objections to offer, and as the administrative departments of City government having jurisdiction find none, it is recommended that the consent be granted only during the pleasure of the Board, revocable at any time, but in no event to extend beyond November 10, 1977.

Compensation—$1,200 per annum.

Security Deposit—$2,500.

Insurance—The company shall maintain insurance in the minimum amounts of $100,000/$300,000 for bodily injury and $25,000 for property damage.

Resolution for adoption.

CALENDAR A—January 14, 1971

No. 127

R-4158, 4137

RESOLUTION for adoption, recommended by the Director of Franchises, fixing February 11, 1971 as the date for a public hearing on the petition of Carey Transportation, Inc. dated December 4, 1970 for a modification of its franchise contract dated July 16, 1959, as amended, so as to authorize said Company to establish and collect a fare of $2.00 on Routes MQ-1 and Q-53.

On December 17, 1970 (Cal. No. 110), this matter was referred to the Bureau of Franchises and the Transportation Administration.

REPORT of the Director of Franchises, dated January 7, 1971, stating that Carey Transportation, Inc. by petition dated December 4, 1970 requested a modification of its franchise contract dated July 16, 1959, as amended, so as to authorize the Company to establish and collect a fare of $2.00 on Route MQ-1 (between the Grand Central Terminal stop and East Side Airlines Terminal, on the one hand, and, on the other, LaGuardia Airport) and on Route Q-53 (between LaGuardia Airport and Kennedy International Airport).

The Company is presently authorized to charge a fare of $1.50 on Route MQ-1 and a fare of $1.35 on Route Q-53.

In order to progress the processing of this petition, it is recommended that the Board of Estimate fix a date for a public hearing on the petition, at which citizens shall be entitled to appear and be heard.

REPORT from the Transportation Administration dated December 31, 1970 stating that the fares charged on mass transit systems should be kept at the lowest possible level. The report further states that unless the review of this petition by the Director of Franchises clearly establishes by financial records that an increase in fares is warranted, the Transportation Administration opposes this petition.

Resolution for adoption fixing February 11, 1971 as the date for a public hearing on the petition.

Exhibit A Annexed to the Affidavit of Werner Kramarsky

well as community tranquility, in addition to the setting of fees which merit attention.

The aforementioned items are characteristic of those which fall under the Board's franchise jurisdiction. This jurisdiction could be reallocated, theoretically, to the Mayor's office, or to some local body such as the Community Board. Shifting the Bureau of Franchises to the Mayor's office would involve a minimum of administrative disruption and might increase opportunities for inter-agency planning; however, it would further remove franchise questions from public surveillance. The Bureau could still hold public hearings, but without the adversary posture that characterizes the Board of Estimate, the public would have less of an opportunity to participate in the actual decision-making.

The other alternative repository of these powers, the Community Boards, presents problems of a different nature. Bus companies, for instance, often operate in several districts; regulation of their routes and fares is, thus, an inherently inter-community problem. The companies naturally prefer, moreover, to concentrate their operations in the more affluent areas, a situation which the Community Boards of the neglected areas might find themselves powerless to correct.

In the matter of revocable consents, the local boards would have to decide upon requests like that of J. W. Mays Inc. for use of an underground tunnel. In order to judge the feasibility of such a request and set a just fee, the Board would require the services of a professional staff. Such a provision is not impossible, but the multiplication of such staff by all the Community Boards in the city would entail a considerable addition in expense over the present Bureau of Franchises. A natural response would

be a city-wide staff to serve all the Community Boards, but this would be the same as centralization. Community Boards could probably handle the granting of consents to their own satisfaction, although a wide fluctuation in the fees paid might result. It must be remembered that these matters affect the public purse and that it would be impossible to conceive of a non-uniform standard in these cases. If there was a difference in standards, franchise holders could claim that their fee was set in an arbitrary and capricious manner by the local body, and would tend to subject each rate setting to litigation.

The Board of Estimate did not gain sway over franchises by accident. It was given jurisdiction by the State Legislature in 1905 because the Board of Aldermen was abusing its control over such matters. The Board was deemed more cognizant of the general interest and less amenable to narrow pressures. The Board has the Bureau of Franchises for technical matters, a representative structure for resolution of inter-community differences, and a public hearing procedure open to any individual or community group. It also possesses the intangible advantage of almost 70 years experience with franchise questions, an attribute which would be diminished by diffusing its powers throughout the city.

d) Should the Board be able to grant relief from public letting in purchases and/or contracts for services?

Under present statutes, all city agencies are required to publicly advertise their intention to purchase items or to let contracts. (Charter, Section 344.2) Sealed bids are then submitted by prospective contractors and suppliers, and the city is required to accept the lowest bid unless the Board of Estimate, by a 2/3 vote, authorizes acceptance

of a bid which is not the lowest. (Charter, Section 343.a & b) In essence, relief from the procedures of public letting is merely the authorization to make a purchase or sign a contract which may or may not be at the lowest price. Charter provisions relating to public letting and advertising contracts are designed to reduce the cost of city government by fostering competition in the awarding of city business. Public bidding and advertising are, however, time consuming and expensive procedures, and occasionally it is more efficient to make purchases or contract for services without public letting.

Generally, relief from public letting is granted when the city agency knows in advance that there is only one firm which is capable of supplying the desired material or performing the required service, when there is an overrun of more than 5% on publicly let contracts, or when a unique kind of equipment is required in order for the new purchase to be compatible with existing facilities. In any event, all relief from public letting must be investigated by the Bureau of the Budget and, in some instances, by the Comptroller to determine that the exemption is, in fact, in the public interest.

Item Number 157 (Calendar A) is typical of the matters coming before the Board which concern relief from public letting. However, the initial question to be answered is whether or not there should ever be relief from public letting. Clearly, this must be answered in the affirmative in the complex technological and scientific environment of today. Such relief must, however, be dependent on predominant evidence of special circumstances and the absence of viable alternatives. This finding will require investigatory and technical expertise in whatever agency has the responsibility. The opportunity for abuse has been well-recognized in the past.

CALENDAR A—January 14, 1971

No. 157

R-4140

RESOLUTION for adoption recommended by the Director of the Budget, approving a request by the Commissioner of Purchase to purchase without public letting 10 model 41 cash registers with self checking code and paper tape attachment from the National Cash Register Company for use of the Parking Violations Bureau of the Department of Traffic for a sum not to exceed $89,000 chargeable to Code 61-1485-11-52.

On December 17, 1970 (Cal. No. 151), this matter was referred to the Director of the Budget.

REPORT of the Director of the Budget dated December 24, 1970, stating that the staff of the Parking Violations Bureau has evaluated cash register equipment from various companies. The study indicated that the NCR cash register #41 was dependable, required little service, was supported by systems engineers and would best serve the needs of the Parking Violations Bureau. The use of the self-checking digit verifier device will enable the Parking Violations bureau to eliminate errors in the processing of summons numbers. The paper tape device will permit the capture of the data for subsequent entry into the data processing system without the keypunching of punched cards. The estimated savings from the use of the paper tape for cashiering operations are $37,000 annually while the savings from the elimination of error look-ups may save up to $30,000 per year.

In addition, the NCR 41 cash register is a flat feed machine which appears to be preferable for PVB operations.

The Parking Violations Bureau has been renting NCR 41 cash registers without the devices for the past 6 months and the equipment has proven to be satisfactory and reliable. NCR is ready to build to PVB specifications NCR 41 cash registers which will include the self-checking feature and ability to use the paper tape equipment. This equipment is available only from the NCR Company.

Resolution for adoption.

Exhibit A Annexed to the Affidavit of Werner Kramarsky

The terms and conditions set by the Board for the expenditure of city funds have a direct bearing on public letting procedures. Many small firms are effectively excluded from bidding on city contracts because they cannot provide the security necessary to guarantee that the work will be successfully completed. Such performance bonding is one of the terms and conditions set by the Board.

Administrative decentralization of these responsibilities of the Board of Estimate would require substantial expert staff at the decentralized level. There would, however, still need to be a central agency to establish guidelines and to monitor the local agencies adherence to such rules. At present, recommendation from the Bureau of the Budget is required on most items and, also, the Comptroller's office is often asked for a report.

Political decentralization would tend to shift both purpose and personnel. Even if the substance of a purchase or contract were determined centrally, the performer of the contract would be different. The priorities and concerns of local governmental authorities will differ from those of a city-wide body, but whether the priority is better delivery of services or more jobs for community residents will depend on who controls the local government. The current rules governing the qualifications of the contractors (lowest bidder, bonding, insurance, unionized work force, etc.) leave virtually no flexibility on any level. If the power to grant relief from public letting is ceded to local governmental units, the process can be used to circumvent any city-wide guidelines. In effect, such contracts must become the patronage of local governmental structures.

Permitting local initiative in exempting contracts from public letting would create substantial city-wide problems. As previously noted, local governmental units will tend

to make city contracts a source of patronage. Consequently, a service like filling potholes, which must be replicated in every area of the city, will not be performed on a city-wide basis. Pressures will be created for local governmental units to award pothole filling contracts to neighborhood construction firms, regardles of whether they are the least expensive. However, even without permitting local governmental units to exempt contracts from public letting, problems will arise merely in defining the scope of work. If a different pothole filling contract is let for each neighborhood, to enable adequate monitoring of the work and to prevent the contractor from avoiding accountability by claiming more urgent work is required in a different district, one might find, at a minimum, that the economies of scale would be sacrified. It is rather unlikely that the pothole filling requirements of all the city's neighborhoods could be subdivided into economically efficient units. One neighborhood might have enough potholes to require one crew working full-time on the problem, but two other districts might need a crew only half the time. If these two districts are adjacent, there would be fewer problems than if one was in the far reaches of Queens while the other was in the Northwest Bronx. Two half-time pothole filling contracts are obviously more expensive than one full-time. Some districts will have heavier traffic or older roadways than others, thereby creating problems in equitably allocating resources. In addition, the local governmental units could use the power to exempt (or not exempt) contracts for filling potholes as a weapon (i.e., preventing the filling of potholes until express buses are removed from their streets or, deliberately allowing the roads to deteriorate as a means of slowing down traffic on a street.)

Local review of exemptions from public bidding would create virtually no problems. The local governmental units would serve as a watchdog over the exemptions of the central government. Mandating local review of exemptions from public bidding would be an asset in terms of forcing the central government to disseminate information. Local review would expose the decision-making process to greater local scrutiny.

Local veto of exemptions from public bidding would probably, like local review, create few problems and give the neighborhoods some power with respect to increasing the efficiency of government. However, local veto could also be used as a weapon if the exemption from public letting could be refused until a local contractor gets the job. In practice, though, it is highly unlikely that the governmental units would ever object to an exemption from public bidding because it would mean delay in the performance of a service or the acquisition of an item. Governments usually act slowly, so it is unlikely that a responsive local governmental body would act in such a way as to further delay the performance of a service or the delivery of an item desired by their constituents, even if it meant saving money.

Exempting contracts from public letting is, and should be, a rarely used power. Decentralizing the power would tend to make the process of letting contracts chaotic and inefficient.

e) Should the Board have the power to make decisions concerning public improvements in the city?

The Board of Estimate is empowered to undertake improvements in the city under the following New York City Charter provision, "Nothing (contained in this sec-

Exhibit A Annexed to the Affidavit of Werner Kramarsky

tion) shall impair or diminish the power of the city to install, construct, reconstruct, repave or repair sidewalks, or to fence vacant lots or to fill sunken lots, or to enter into contracts with the owners of premises abutting on streets for such installation, construction, reconstruction, repaving or repair of sidewalks, or fencing of vacant lots or filling of sunken lots, upon such terms and conditions as may be approved by the Board of Estimate." (Charter, Section 230 e)

The Board of Estimate does not initiate items, but rather decides those matters which have been referred to it by various agencies and/or personages. It does not, for example, directly order any department to repair a sidewalk or fill a pothole, etc. Instead, these requests are brought before the Board for approval. But they do not come before the Board as isolated items; rather these requests appear in the form of a contract, a line proposal in the budget or a change in the city map.

In the analysis of the Board calendars, there were very few items which could be considered purely under the heading of public improvements. Indeed, even the following example, Item Number 184 (Calendar C), could be considered to fall under the Board's power to make changes in the city map. Although few of these isolated items exist, the Board's power to make public improvements is a necessity, since it is inevitably linked to its power to make changes in the city map.

Neither political nor administrative decentralization can effectively deal with the interlocking nature of the Board of Estimate's powers. There is little argument that potholes are more readily noticed by local residents than by a central administration. It is less easily understood and far more complicated to remove the hazard of an excava-

CALENDAR C—February 11, 1971

No. 184

R-9317

COMMUNICATION dated February 4, 1971, from the Administrator, Housing and Development Administration, transmitting proposed resolution authorizing the filing of an application with the Federal Department of Housing and Urban Development for a Third Amendatory Demolition Grant.

The Third Amendatory Demolition Grant is intended to upgrade the quality of the demolition areas by continuing the removal of blighted and decaying buildings to create an environment which is conducive to promoting private owners to upgrade their own facilities. The Amendatory Grant is part of an ongoing process started in 1966 with our first Federal Grant and continuing up until the present with the First and Second Amendatory Grants.

On December 19, 1968 (Cal. No. 145), the Board of Estimate approved a proposed amendatory contract in connection with the aforesaid matter.

For consideration.

tion in District A, which endangers buildings in District B, particularly if the only contractor available has his office in District C and employs primarily residents of Districts D & E.

The need for an efficient response system is an unargued need; the possibilities of decentralizing the power to undertake public improvements are, at best, doubtful.

f) Should the Board of Estimate have the power to make zoning and street map changes and to approve housing and urban renewal projects?

Of all the powers granted to the Board of Estimate, the power to make changes in the city map (Section 199 b,c) and to decide on zoning regulations (Section 200 2,3) is secondary in importance only to its influence in the budget process. Changes in the city map which mainly concern use of streets and zoning must be examined by the City Planning Commission, although the final decision rests in the Board.

The closing or alteration of streets creates controversy because it affects availability of parking, dislocates existing traffic patterns, and alters the width of sidewalks.

For example, businessmen's concern with easy access to their place of business often conflicts with local residents' concerns for pedestrian safety, easy parking, and safe places for children. A proposal to close a street on which commercial properties abut would raise protests from the businessmen because access to their stores would be more difficult and pick-ups and deliveries less convenient. Similarly, community residents would probably protest the increased traffic on the nearby residential streets caused by the closing. Sidewalk width is also a matter of concern

because it affects the availability of parking space or standing room for cars.

Zoning, however, is far more controversial than street use. Local communities agitate for vacant land to be rezoned as parks, schools, or other public facilities which produce no revenue. On the other hand, public officials responsible for the fiscal solvency of the city are interested in maintaining and developing the tax base. In addition, zoning controversies have an aesthetic component. Residents in areas of one-family houses resist high-rise construction and the encroachment of commercial zoning which brings floods of strangers into the neighborhood, increases the traffic on their residential streets, and monopolizes the already scarce parking space. Needless to say, such arguments are also often used for less substantive reasons.

These street use and zoning decisions are made by the Board of Estimate because, although each specific decision affects a relatively small geographic area, they all have city or at least borough-wide implications.

In reviewing street closings, the Board has to determine whether the area to be enclosed is essential for frontage or public purposes. Item Number 13 (Calendar A) was a communication from the Borough President of Brooklyn requesting the closing of four streets to incorporate them into a site for Northeast Brooklyn High School. The City Planning Commission had stated that the street areas to be closed were not necessary for street purposes, and the Board of Estimate subsequently approved this item unanimously. While recommending the street closings, the City Planning Commission also stated the need to modify the lines and grades (Item Number 40, Calendar A) of the street system encompassing that area. They also recommended widening a nearby street by ten feet in order to

CALENDAR A—January 14, 1971

No. 13

R-6486, 4032

PUBLIC HEARING in the matter of a communication dated August 27, 1969 from the President of the Borough of Brooklyn submitting a map (V-2009) showing the discontinuance and closing of Florence Street and La Grange Street from Grand Street to Maujer Street and of Maujer Street and Ten Eyck Street from Bushwick Avenue to Waterbury Street, Borough of Brooklyn.

On September 18, 1969 (Cal. No. 190) this matter was referred to the City Planning Commission and the Director of the Budget.

This matter has been duly advertised in accordance with a resolution adopted by the Board on December 17, 1970 (Cal. No. 176).

REPORT of the City Planning Commission (CP-20927, dated November 5, 1969) stating that the street areas to be closed are apparently not essential for street purposes and it is proposed that they be incorporated into the site for the Northeast Brooklyn High School in the Williamsburg section of the Borough.

The site area is bounded by Grand Street, Waterbury Street, Stagg Street and Bushwick Avenue and title to the area was acquired by the City on June 23, 1969, including the streets to be closed.

The streets under consideration are fully improved and in use.

Approval of the closing map under consideration is predicated upon the prior approval of the related map change (CP-20928) referred on September 18, 1969 (Cal. No. 191) and which is the subject of a separate favorable report dated November 5, 1969 which states that the streets under consideration are not essential for frontage or any public purpose and their elimination and closing appears to be unobjectionable.

After approval of the related map change (CP-20928), the closing map now under consideration may be adopted. The resolution discontinuing and closing the streets under consideration should include the adoption of the closing map and should specify the date upon which these streets shall become and be closed. After the date fixed for the discontinuing and closing, the closed street areas may be assigned by the Board to the Board of Education upon the determination that they are no longer required for street purposes.

The matter was the subject of a public hearing duly held by the Commission on October 22, 1969 (Cal. No. 41). No opposition developed and the hearing was closed.

The matter was considered further at a meeting held by the Commission on November 5, 1969 (Cal. No. 28) at which time it was determined that the map under consideration is an element in the formal process of discontinuing and closing portions of streets no longer required for street purposes.

The City Planning Commission recommends that the closing map under consideration be approved after the adoption of the related map change (CP-20928) referred on September 18, 1969 (Cal. No. 191).

REPORT of the Director of the Budget, dated December 10, 1970, recommending approval after a public hearing.

Close the hearing.

Resolution approving the closing map.

(See Cal. No. 40).

CALENDAR A—January 14, 1971

No. 40

R-6487

IN THE MATTER of a resolution, recommended by the City Planning Commission approving a map submitted by the President of the Borough of Brooklyn, which provides for modifying the lines and grades of the street system within the territory bounded by Grand Street, Morgan Avenue, Scholes Street, Bushwick Avenue, Maujer Street, and Humboldt Street, including the elimination of several streets therein, Borough of Brooklyn.

On September 18, 1969 (Cal. No. 191) this matter was referred to the City Planning Commission.

REPORT of the City Planning Commission (CP-20928, dated November 5, 1969) stating that the map relates to a five block area in the Williamsburg section of the Borough and provides primarily for elimination of the lines of Florence Street and La Grange Street from Grand Street to Maujer Street, and of Maujer Street and Ten Eyck Street from Bushwick Avenue to Waterbury Street, in order to permit the consolidation of the site for the Northeast Brooklyn High School.

The map further provides for a 10-foot widening of the west side of Waterbury Street between Grand Street and Stagg Street and of Grand Street to a point 47.5 feet east of Bushwick Avenue. These widenings are designed to improve vehicular and pedestrian traffic circulation around the school.

The map also provides for adjustments in the grades which are occasioned by the street line changes. In addition the map provides for a number of grade changes in the peripheral streets in order to conform more closely with existing conditions. These grade modifications will not adversely affect sewerage and surface drainage requirements.

The four streets which are proposed to be eliminated are in City ownership and are not required for frontage or any public purpose. Florence Street and La Grange Street are in use at their mapped widths of 40 feet. Ten Eyck Street and Maujer Street are in use at their mapped widths of 50 feet and 60 feet, respectively.

The City vested title to the school site on June 23, 1969.

The effective closing of the streets proposed to be eliminated will involve the adoption by the Board of a map submitted for this purpose. Such a map (CP-20927) was referred to the City Planning Commission on September 18, 1969 (Cal. No. 190) and is the subject of a separate favorable report dated November 5, 1969.

The map change was the subject of a public hearing duly held on October 22, 1969 (Cal. No. 42). No opposition developed and the hearing was closed.

The matter was considered further at a meeting held by the Commission on November 5, 1969 (Cal. No. 29), at which time it was determined that the map change, designed to eliminate several streets to provide a site for the Northeast Brooklyn High School, is an acceptable modification of the City Map.

The City Planning Commission recommends that the map change under consideration be approved.

On December 17, 1970 (Cal. No. 177), the matter was laid over to this meeting.

For consideration—resolution approving the map change.

(See Cal. No. 13.)

improve vehicular and pedestrian traffic circulation around the school. These changes were also approved by the Board unanimously.

Under a system of administrative decentralization, the engineering services necessary to make such a determination would have had to be available to the local government unit. In the event that such a street closing would, in fact, have an adverse effect on the sewage and surface drainage of the area, the remedy would doubtless have severe budgetary implications. (In this case, the City Planning Commission maintained that the grade modifications would not affect surface and sewage drainage).

Under a system of political decentralization, such a street closing would cause major problems if the modernization of schools or street lighting were competing for the funds needed to relocate the sewers and construct adequate drainage facilities. However, in the event that there are limits on the degree of budget flexibility available to the local governmental unit, such a street closing could be handled on the local level (as long as it did not disrupt the flow of traffic throughout a wider area or the entire borough). It might be possible under a system of political decentralization to designate two types of streets, local and non-local. The decentralized governmental units would be responsible for local streets, while control of major arteries would remain with a borough-wide or city-wide authority.

Another example is that of a street closing necessitated by the expansion of a voluntary hospital. In such a situation there already exists a certain degree of local initiative. At present, if a community institution such as a voluntary hospital feels that enlarging its facilities is necessary to cope with an increased service demand, it applies to the City Planning Commission for the discontinuance and

closing of the needed street. Concurrently the hospital apprises the Community Board of its reasons for the request. Eventually recommendations from the Community Board and Planning Commission will be voted on by the Board of Estimate.

What must be pointed out is the difference between community and institutional or private initiation. An example of community initiation might be the request for the demapping of a street for playground purposes. In practical terms this would probably be addressed initially to the Borough President. The formal process is identical to the previous examples.

At present, the majority of locally initiated terms stem from voluntary and private institutions, despite the fact that their plans might conflict with the wishes of the surrounding community. For these street closing matters, the institutions view the Community Board primarily as a part of the review process which ultimately culminates in a decision by the Board of Estimate.

Any recommendation made to the City Planning Commission concerning street closings will automatically be referred to the Community Board for review and comment. Although the Board of Estimate receives reports from the Community Boards on these matters, this is not required by the Charter. The Charter merely asks that the Community Board make recommendations to city agencies and that these recommendations be noted in the agency reports. The Charter might mandate that Community Boards make recommendations to the City Planning Commission and the Board of Estimate on matters of this nature.

The existence of local veto power has always been publicly denied, yet examples can easily be cited that evidence

some degree of local veto. Local community pressure on the Mayor, Board of Estimate or City Planning Commission has halted projects which served city-wide objectives, (e.g., a cross-borough expressway, certain scatter-site housing, a frequently relocated public high school). Denial, by local veto, of a street closing may adversely affect the availability of services to neighboring districts, and even to the borough or city as an entirety. No community particularly desires power company substations or sanitation garages, yet without such facilities the operations of city-wide agencies would be impossible.

Local responsibility must also be examined in terms of economic cost as opposed to social cost of a particular project. In part, judgments must be based on the comparative costs of one site or another. This is particularly true when the project is sponsored by a voluntary or non-profit agency. Cost-of-money, debt service, and viable tax base are not as persuasive to local governmental agencies as they are to a city-wide body.

Another kind of issue (Item Number 41, Calendar C) which the Board of Estimate was asked to decide was whether a C 1-2 area (Local Retail District) should be established within an existing R 5 (General Residential District). The commercial developer had originally asked for a C-2 zoning resolution because he thought that he could not comply with the accessory off-street parking regulations required by the zoning ordinances. According to the zoning laws, a C 1 or C 2 commercial district within an R 5 residential district must provide access to off-street parking for 42.5% of the units in the building. However, off-street parking requirements are determined by the residential district (R 5) within which the commercial district is mapped. For example, had the commercial district been

CALENDAR C—February 11, 1971

No. 41

R-4240

IN THE MATTER of an amendment of the zoning map (section 10c) establishing within an existing R5 district, a C1-2 district bounded by Roosevelt Avenue, a line passing through a point on Roosevelt Avenue distant 228.5 feet easterly of 155th Street and at an angle of 73 degrees 25 minutes with Roosevelt Avenue, a line at right angles to the last mentioned line at a point 155.8 feet southerly of Roosevelt Avenue, and a line 100 feet east of 155th Street, Borough of Queens, as shown on a diagram dated December 9, 1970.

REPORT of the City Planning Commission (CP-21434, dated January 20, 1971), stating that this rezoning was requested by both the owner and the contract purchaser of the affected property. The original request for a C2 District was modified by the Commission.

On December 9, 1970 (Cal. No. 13), the City Planning Commission scheduled a Public Hearing on the proposed change. The hearing was duly held on January 6, 1971 (Cal. No. 47). There were no appearances and the hearing was closed.

The Commission is in receipt of a communication from a local civic organization in opposition to the proposed amendment.

The applicant requested a change to a C2-2 District contending that he could not meet the accessory parking requirements for a C1-2 District. However, the required accessory parking requirements are the same for a C1-2 District, as proposed by the Commission, as they are for a C2-2 District.

The affected property is presently developed with a two story real estate and Insurance agency, which is to be demolished and replaced by a new commercial building.

The applicant has agreed to set back the new building from Roosevelt Avenue in line with the front wall of a proposed library adjoining the site on the west and to demolish the existing building prior to the start of new construction.

The rezoning, as proposed by the Commission, constitutes a minor extension of an existing C1-2 District which will provide a more logical zoning pattern for the area without any adverse effect on surrounding properties.

The Commission therefore considered the rezoning appropriate and adopted a resolution, which was filed with the Secretary of the Board of Estimate, pursuant to Section 200 of the New York City Charter, on January 20, 1971.

The Board of Estimate may approve, disapprove or modify the recommendation of the City Planning Commission within 60 days from the date of the filing of such recommendation with the Board which period will expire on March 21, 1971.

On January 28, 1971 (Cal. No. 95), the matter was laid over to this meeting.
For consideration.

drawn in an R 6 residential area, only 35% of the units would have required accessory off-street parking facilities. "Regulations to limit the height and bulk of buildings, determine the area of courts and other open spaces, to regulate and restrict the location of trades and industries and the location of buildings designed for specific uses, or creating districts for any such purpose" (Charter, Section 200) are also within the province of the zoning power. The City Planning Commission has the power to alter any and all of the zoning resolutions, subject only to a veto by the Board of Estimate. The Board must exercise its veto within sixty days of the new resolution promulgated by the City Planning Commission. The Board of Estimate's power over zoning is substantially shared with the City Planning Commission and the public. The Board is required to hold the public hearings on all zoning resolutons. In addition, if twenty percent of the owners of properties abutting or within 100 feet of the area affected by the changed regulation protest the change in writing, then three-fourths vote of the entire Board is necessary before the resolution becomes effective.

The current division of land use and zoning powers between the Board of Estimate and the City Planning Commission has often been criticized as being cumbersome and inefficient. It has been suggested that the complete power over land use and zoning be transferred entirely to either the City Planning Commission or the Board of Estimate. Vesting these powers in one body would certainly increase decision-making efficiency if only because of a reduction of both the number of decision-makers and the number of steps needed for approval. Furthermore, consolidating these powers would sharpen the focus for community groups anxious to influence land use and zoning decisions.

Vesting these powers in only one body would also facilitate having public hearings held in the communities affected by the decision.

The original rationale underlying the creation of the City Planning Commission was to create a body to influence the zoning and land use decisions which had extensive professional expertise, was above political pressures, and had a city-wide perspective.

Thomas D. Thacher, Chairman of the New York City Charter Revision Commission (1936), wrote: "The Charter Commission has, therefore, concluded to continue the Board with its present composition and to bring into its deliberation, through the agency of a City Planning Commission, independent, competent, and public advocacy of the interests of the city as a whole. . . . The Planning Commission is made as independent of political influence and control as possible." (New York Times, November 11, 1936) The members of the City Planning Commission are presently appointed by the Mayor for a fixed term of eight years and may be removed only for official misconduct, negligence, or mental or physical disability. It was recognized by the Thacher Commission that the "ultimate responsibility" for changes in the city map and zoning regulations should remain with the Board of Estimate as publicly elected officials, but that the City Planning Commission would make recommendations which would be difficult to override in view of the requirement of a three-fourths vote.

Concentrating the zoning and land use powers exclusively in the hands of the City Planning Commission would tend to diminish the influence of local community groups. Though the City Planning Commission is required to hold public hearings, the fact that members are appointed for fixed terms enables them to disregard the testimony and

wishes of community groups. Under this system, an opposing group would only have recourse to the Mayor who, in turn, would be able to disclaim any responsibility. The "professional judgments" of the City Planning Commission would become land use policy without any further review by a political body. This would constitute a substantial enlargement of the power of the Mayor.

The other alternative, transferring the powers over zoning and land use decisions entirely to the Board of Estimate, would require moving the personnel of the Department of City Planning to the Board's jurisdiction. While this would provide the Board with needed staff, such professional opinions could only affect decisions to the extent of Borough Presidents' and city-wide elected members' convenience. Professional opinions could easily be dismissed if political expediency so required.

The somewhat adversary nature of the relations between the Planning Commission and the Board of Estimate seems to generate a socially productive conflict. Testimony to the Board of Estimate is sharpened by the more detailed discussion at the Planning Commission, and the recommendations of the Commission are prepared in the expectation of careful public scrutiny at the Board.

Under a system of political decentralization, where each local government could not only change zoning designations, but also the specific requirements of such designations, chaos would ensue. One district might permit construction of so much high-rise housing that the ancillary services of sewage, power supply, school space availability, etc., would not be adequate to sustain the increased demand. On the other hand, a system of administrative decentralization would at least bind the local governmental units to a uniform code of building restrictions. The natural propensity among small governmental units would be to maximize the amount of park land and to provide a minimal amount of commercial land. A compromise resolution might be that a formula based on population density, tax base, etc., could be developed that designates for each new governmental unit percentages of land use (i.e., 15-17% park and playground, 12-14% public buildings and tax exempt properties, 45-50% residential, 7-10% commercial, etc.). As previously indicated, the zoning power has tremendous repercussions in terms of the budget, because zoning affects the city's tax base.

Finally, the Board of Estimate has the power to approve sites and plans for urban renewal projects under state law. Housing and urban renewal projects have a significant impact on the city's finances because of the tax abatement which invariably accompanies such projects (Title I of the Housing Act of 1949, and Article II & V (Sections 36 A & 150) of the Private Housing Finance Law). These financial problems could be avoided under a system of administrative or political decentralization by creating parameters which require that the new governmental units raise a certain amount of revenue within their local jurisdictions. In short, the powers of the Board of Estimate over purely local zoning and street use matters could be decentralized only if the power to make decisions *and* the responsibility of raising revenues are vested in the same body. City-wide concerns (such as water tunnels) which transcend local lines would have to remain centralized, and obviously, some sort of central agency would have to be retained for defining the aforementioned parameters.

In matters concerning the city map and zoning the Board of Estimate is the compromise between city-wide and local control. Bringing the power to zone and make changes in

the city map to local governmental units would make coordinated city-wide planning virtually impossible. However, vesting these powers exclusively with the City Planning Commission or the Mayor would make it virtually impossible for local concerns to be adequately expressed. The presence of the Borough Presidents on the Board of Estimate means that local concerns about zoning and changes in the city map have a better chance of being heard.

g) Should the power to amend the capital or expense budget be exclusive with the Board?

The Board of Estimate is intimately involved in both the capital and expense budget adoption process, and the Board's statutory powers over the budget cannot be discussed independently of the individual budgetary powers of its members.

The Mayor is directly involved in the capital budgeting process at four different points and indirectly involved at several others. The Mayor must issue a certificate (Sec. 215) based on the Comptroller's report, setting the maximum amount of debt which the city may incur in the ensuing fiscal year. The City Planning Commission, which is appointed by the Mayor, holds public hearings and submits a draft capital budget. In point of fact this draft capital budget is drawn up together by the City Planning Commission and the Bureau of the Budget. The city-wide allocations are made by the City Planning Commission, while the technical decisions are made by the Bureau of the Budget (Sec. 217). The Mayor may then autonomously change the Planning Commission's recommendations, and then the amended document is sent to the Board of Estimate (where the Mayor and the Comptroller each hold 18% of the votes) and the City Council. The Board of Estimate

and the City Council both hold hearings on the proposed budget and may add or eliminate projects, change appropriations, or alter terms and conditions (Sec. 221). The Mayor may veto any such changes, which can then be overridden by a two-thirds vote of the Council and Board (excluding the Mayor) meeting in identical terms (Sec. 223). Thus, the Mayor is strategically involved in every step of the adoption process, with the exception of overriding his own veto.

Once adopted, the capital budget may be amended during the year only if approved by a two-thirds vote of the City Planning Commission, with the written approval of the Mayor, Board of Estimate, and the City Council (Sec. 224). However, the fact that the capital budget is a six year planning document means that the annual adoption is, in effect, an amendment to the existing document. Nonetheless, mid-year amendments to the capital budget are essential. In cases where more money has been budgeted for an item than is actually spent in its completion, the budget must be amended before those funds can be transferred to another project.

Adoption of the budget does not mean that the items contained therein will become realities; the budget must be implemented. Even after an item is included in the capital budget, the Board of Estimate must hold another public hearing before any money can be spent on the project. This process, called "initiating" a capital budget item, authorizes the Mayor to issue a Capital Project certificate (CP) against which billings can be made by the Comptroller. The Corporation Counsel then begins condemnation proceedings in applicable cases, and the department concerned advertises the relevant contracts for bidding. Projects requiring changes in the city map will come before the Board

yet another time. In addition, new sites for capital budget items must be approved by the Site Selection Board. The Site Selection Board consists of three mayoral appointees: the Director of the City Planning Department, the Budget Director, and the Municipal Services Administrator. Two publicly elected members of the Site Selection Board (who also serve on the Board of Estimate) are the Comptroller and the Borough President (or Presidents) of the area in which the project will be built. Consequently, community residents have several opportunities to argue capital budget items. They can appear before the City Planning Commission and the Board of Estimate; they can exert pressure on their Councilmen or Borough Presidents. So even though the City Charter prescribes the means for amending the capital budget, proposed projects can be prevented by a variety of administrative devices. The Mayor alone can thwart the implementation of a project by merely refusing to issue a CP or by instructing his appointees to not agree on a site. The Board of Estimate on the other hand, can thwart the Mayor and Council by refusing to close the mandated "initiation" hearing. (Note: a recommendation on this issue has been made in a separate report.)

Under the 1936 Charter, certain capital projects (like roads and sewers) were considered assessable improvements and could not be implemented unless local residents requested the construction. The old Charter recognized that borough or city-wide considerations might have to take precedence, so the Borough Presidents were empowered to request certain improvements in spite of local opposition. However, the delegation of authority does not ensure that it will be exercised; Borough Presidents rarely opposed the wishes of their constituents. Consequently,

there is currently a lack of major north-south arteries in Queens precisely because the priorities of the people living along major thoroughfares are different from those of the people who have to use them. Under the 1936 Charter, whenever the Borough President proposed straightening or widening a north-south artery, fierce opposition from abutters prevented the project from being implemented. The basic question of whether or not an efficient road system is more important than the quiet safety of a residential neighborhood will remain regardless of who makes the decisions on capital budget items.

It would appear to be reasonable and proper that the process for amending the capital budget should parallel the adoption process. Under the present system, the same bodies responsible for adopting capital budget items are also responsible for amending them, although the power of the City Planning Commission is much greater in the amendment process. If the amending process were made easier or concentrated in fewer hands than the adoption process, the budget would become a basically meaningless document, subject to constant circumvention through the amendment process. A budget is literally a statement of anticipated income and expenditures. The budget adoption and amendment processes are merely the means of determining how such money will be raised and how much will be spent. All points of view (city-wide, local and individual) must be strongly represented in the budgeting process if the government is to function with the consent of, and not in opposition to, the governed.

Increasingly during the last few years, disputes around the budget process have focused on local or community participation in the creation of the city's capital budget. In order to clarify the issues involved, one needs to dis-

tinguish at the outset between those capital projects which are already identified in the budget document and those which are contained in lump sum appropriations for agencies. Even in these major sub-divisions, it is necessary to distinguish between items serving areas larger than the community (such as, for example, automatic elevators in a borough hall) and items serving specific localities (such as a branch library).

The major thrusts of the public argument have been to establish procedures for local initiation, review and even veto. It has been said that the capital budget process neglects or ignores the priorities of the communities, denies them capital projects which they require, and inflicts on them capital construction against their wishes. Obviously, such a view tends to denigrate existing procedures and established processes for hearings and comments by community representatives and individuals *pro-se*.

Existing practice, of course, already deals with perceived community and city-wide needs. The generation of a capital project request by a city agency to the City Planning Commission, eventually reflected in the Executive Capital Budget, does not occur in a vacuum. It is based on the agency's perception of an area's need. There is no doubt that such an agency's perception may be at variance with the views of some or even all of the residents of the particular area, and at the Planning Commission hearings as well as at the Board of Estimate hearings there is considerable opportunity for the exploration and resolution of such differences.

In the event that city agencies are remiss in recognizing a capital requirement for a particular community, locally based organizations can request a planning appropriation or even construction funds at the aforementioned hearings,

or through Councilmen or Borough Presidents. That is not to say that this process could not be improved upon. Community Boards, particularly if they were more directly representative, could be granted capital budget initiation powers subject to review and approval by the City Planning Commission and the Board of Estimate. In effect, this would mean that these Boards could demand the discussion of a particular project that they desired at the executive level. It would be well to remember in analyzing the merits of such an arrangement that these Boards are in no way involved in raising the funds required for the project. In addition, it is important to keep in mind that New York City's population is highly transient.

The review powers now granted to Community Boards could easily be enlarged by granting them "powers of substitution." That is to say, if a project were proposed for their community in the amount of $3,000,000, such a Board could recommend to the Planning Commission a different capital project of equivalent cost, subject again to the approval by the Planning Commission and the Board of Estimate. It should be self-evident that these powers would fall far short of the power to veto and that there is little reason to believe that such absolute power should rest in any locality. One should also be aware that a realistic, if not legal, veto exists at present. If there were an overwhelming opposition to a particular project, pressure on local and city officials would tend to prevent its final approval.

A new city water tunnel running through four of the five boroughs and requiring extensive excavation and demolition is a classic example of the need for a central final authority. It is less evident when dealing with the construction of a new intermediate school and even less when

dealing with a branch library. Each of these is clearly identified in the capital budget and each of these is therefore subject to the series of public forums discussed earlier. It is, however, virtually impossible to publicly discuss those capital budget improvements purely local in nature and contained in lump sum appropriations, such as a traffic light.

Assuming but not granting the local nature of the last example, it could be argued that a particular community should have the absolute right within a pre-determined budget appropriation to select the sites of traffic control devices. In order to place such public improvements in their proper perspective, it must be noted that traffic lights control not only the vehicular and pedestrian traffic at their own locus but influence the flow and frequency of traffic in adjoining communities and may well have a substantial impact on arterial traffic surrounding the subject community.

Moving up in the scale of "localness," a brief analysis of the impact of a branch library or an intermediate school will indicate their cross-community impact. Siting a new branch library or intermediate school must be related, if planning is to have any meaning at all, not to existing population but to future population patterns and to the demographic projections for the area.

It should be evident from this review that in the expansion of community powers as distinct from community consultations, there inheres the grave risk of intra-community chauvinism and inter-community alienation.

Finally, any discussion of capital budget programs would lack validity if the impact on the expense budget were ignored.

BOARD OF ESTIMATE

Journal of Proceedings of Meeting of the Board of Estimate, Held in Room 16, City Hall, Monday, February 2, 1970.

The Board met pursuant to adjournment.

Present—Werner H. Kramarsky, Special Assistant to the Mayor (4 votes); Abraham D. Beame, Comptroller, and Joseph J. Perrini, Acting Comptroller (4); Sanford D. Garelik, President of the Council (4); Percy E. Sutton, President, Borough of Manhattan (2); John J. O'Neill, Acting President, Borough of Brooklyn (2); Bertram A. Weinert, Acting President, Borough of The Bronx (2); Ralph F. DeMarco, Acting President, Borough of Queens (2); and Rocco D. Zasa, Acting President, Borough of Richmond (2).

The President of the Council, the Honorable Sanford D. Garelik, presided.

Where no motion is recorded in the disposition of the following items, the Chair, without objection, directed the roll call.

PUBLIC HEARING

STATUTORY

On Change in the Expense Budget

Cal. No. 1.

Public Hearing in Matter of Proposed Transfer of Funds from Fund for Salary and Wage Accruals to: (1) Mayoralty, to Establish Office of Intergovernmental Relations; and (2) President of Council and City Council, to Adjust Annual Compensation of President and Councilmen.

(Second Call)

The Acting Secretary presented an affidavit of publication, showing that the matter has been duly advertised in accordance with Section 124c of the New York City Charter.

The Acting Secretary also presented the following report of the Mayor:

City of New York, Office of the Mayor, New York, N. Y. 10007, January 13, 1970.

To the Board of Estimate and the City Council:

Gentlemen—In recent communications, the President and the Vice-Chairman and Majority Leader of the City Council requested modification of their respective 1969-1970 budgets in order to provide adjusted annual rates for the President and Councilmen.

Local Law No. 82, effective January 1, 1970, amended the Charter of The City of New York in relation to the compensation of the President of the Council and Councilmen. The salary of the President of the Council was increased from $35,000 to $40,000 per annum and the salary of 37 Councilmen was increased by $10,000 per annum. Total funds required to effectuate the modification for the balance of the fiscal year amount to $187,500.

In a separate action, the undersigned further requests modification of the budget for 1969-1970 to provide for the establishment of an Office of Intergovernmental Relations within the Office of the Mayor. The Charter of The City of New York grants the Mayor the power to create bureaus, divisions or positions within the executive office when the need arises. On January 5, 1970, the establishment of a new position of Deputy Mayor was announced, who would be responsible for a newly created Office of Intergovernmental Relations. One of its major responsibilities would be to obtain for the City its fair share of every State and Federal tax dollar.

The ability of the City to provide its citizens with the services to which they are entitled is directly linked to the resources which are available from Federal and State sources. By the appointment of an additional Deputy Mayor and the establishment of the Office of Intergovernmental Relations, the City will have a full-time coordinated effort to strive on its behalf. This office will be responsible for the development and management of the City's Federal and State legislative programs, as well as to coordinate legislative strategy.

PUBLIC HEARING

It is estimated that funds in the amount of $230,750 will be required for personal service (including expert services) and other-than-personal service for the Office of Intergovernmental Relations.

Since insufficient funds are available in existing appropriations, it is requested that the sum of $418,250 be transferred from Funds for Salary and Wage Accruals (Code 098-009) to the following:

Department	Amount
President of the City Council	$2,500 00
The Council	185,000 00
Mayoralty—Office of Intergovernmental Relations	230,750 00
Total	$418,250 00

Adoption of the attached resolution will effectuate the above transfer of funds and is, therefore, recommended.

Very truly yours,

JOHN V. LINDSAY, Mayor.

No one appeared in opposition or in favor.

The hearing was continued to February 13, 1970.

PUBLIC HEARING

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STATUTORY

—

On Change in the Expense Budget

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Cal. No. 23.

Public Hearing in Matter of Approving Transfer of Funds from Fund for Salary and Wage Accruals to: (1) Mayoralty, to Establish Office of Intergovernmental Relations; and (2) President of Council and City Council, to Adjust Annual Compensation of President and Councilmen.

(Second Call)

The Acting Secretary presented an affidavit of publication, showing that the matter has been duly advertised in accordance with Section 124c of the New York City Charter.

The Acting Secretary also presented a report dated January 13, 1970, of the Mayor (printed in the Journal of Proceedings of the meeting of February 2, 1970—Cal. No. 1), submitting a resolution, recommended by him, approving an appropriation of $2,500 and $185,000 for the President of the Council and the Council, respectively, to provide funds required to implement the provisions of Local Law 82 of 1969. An appropriation of $230,750 has also been requested for the establishment of the Office of Intergovernmental Relations.

On February 2, 1970 (Cal. No. 1), the hearing was continued to this meeting.

The Acting Secretary also presented an amended resolution.

The Honorable Mario A. Procaccino, Esquire, and Reuben R. Gordon, representing Associated Teachers Against Crime, Communism and Corruption, appeared in opposition.

No one else appeared.

Statements were made by the Mayor and the Comptroller.

Statements were made on roll call by the Mayor, the Comptroller, the President of the Council, the Acting Presidents of the Boroughs of Manhattan and Brooklyn and the Presidents of the Boroughs of The Bronx and Queens.

On motion of the Mayor, the hearing was closed, and the following amended resolution was offered:

Resolved, That the Board of Estimate and the City Council, pursuant to the provisions of Section 124c of the New York City Charter, hereby approve the transfer of funds within appropriations made for the fiscal year 1969-1970, effective January 1, 1970, as follows:

	FROM	
	Miscellaneous	
Code 098-009,	Fund for Salary and Wage Accruals	$418,250 00
	TO	
Program		Amount
	President of Council	
I	President of Council	$2,500 00
	City Council	
I	Council	185,000 00
	Mayoralty	
XVI	Office of Intergovernmental Relations	230,750 00

This resolution is hereby approved with the understanding that $25,000, earmarked for consultative services, will not be expended and that the four lines proposed in the Budget, totaling approximately $45,000, will be used for existing personnel.

Which was adopted by the following vote:

Affirmative—The Mayor, the President of the Council, the Acting Presidents of the Boroughs of Manhattan and Brooklyn, the Presidents of the Boroughs of The Bronx and Queens and the Acting President of the Borough of Richmond—18.

Negative—The Comptroller—4.

The expense budget adoption process is similar to the capital budget. Whereas the capital budget deals with the physical plant of the city, the expense budget deals primarily with paying the personnel who actually perform the services. The Mayor receives reports from the Comptroller and Finance Administrator on the various obligations and resources for the ensuing fiscal year. The Mayor submits his proposed budget based on these reports, and the Board of Estimate and City Council hold public hearings before adopting the budget. The Mayor may then veto any changes made by the Board or City Council, which veto can be overridden by a two-thirds vote of both bodies meeting in identical terms. The City Council is then responsible for setting a tax rate which will raise enough revenue to meet budgetary requirements. The Board of Estimate has only one real opportunity to act on the expense budget.

The procedure for modifying the expense budget is contained in the Charter (Sec. 124, i) "Upon recommendation of the Mayor, the Board of Estimate and the Council may, during any fiscal year transfer part or all of any unit of appropriation from one agency to another, or establish a new unit of appropriation within funds lawfully available therefor, or transfer all or part of any unit of appropriation for the purpose of establishing or adding to any new unit of appropriation, or change the terms and conditions of the budget; but in any such case there shall be public hearings."

Although the capital and expense budgets are separate documents, they are both closely related. Construction of a new hospital with capital budget funds will require that the expense budget provide the resources for staffing it several years hence. Such an item has city-wide implica-

tions in terms of the budget, health care planning, transportation, zoning, etc.

The factors involved in the issue of decentralizing the expense budget are highly complex. A study prepared by the City Administrator's office, which examined expense budget expenditures on a neighborhood by neighborhood basis, revealed striking variations in the per capita allocations of resources for various services. (See New York Times 11/13/72) The study found, for example, that educational costs averaged $1,677 per pupil in Bedford-Stuyvesant, and only $544 in Corona-Elmhurst. It is possible to hypothesize a reasonable scheme of allocating resources to the different communities, but there would still be problems on the local level.

Police expenditures per capita in Downtown, Fort Greene, Brooklyn are more than triple those for Bensonhurst-Gravesend. This disparity stems from the fact that the Brooklyn business district requires protection, but because of the natu[illegible] of business districts, has relatively fewer residents. Thus, the expenditures on police in Downtown Brooklyn are also expenditures for those people who live in Bensonhurst-Gravesend, but who work or shop in the Downtown area. So, in terms of local initiation of expenditures for police protection, it would be unfair to allow the residents of Downtown Brooklyn to determine the priority of police protection when their decision will affect the lives of thousands who would have no opportunity to select the decision-makers. In addition, the nature of collective bargaining agreements which the city has made with municipal unions would mean that every change in the priorities of any district would lead to massive reassigning of personnel throughout the city. Thus, promotion or merit raises in one district would alter the budget

relationships sufficiently to cause reassignment in other districts.

Local review of expense budget allocations for a given neighborhood is far more feasible than allowing the locality absolute discretion in determining budgetary priorities. Local review would force the central bureaucracy to publish expenditures on a neighborhood basis. It would give the localities an opportunity to complain about allocations or priorities of which they disapproved, and to lobby for new programs and personnel which they consider more important. Essentially a consultation procedure, local review would permit maximum community input without jeopardizing city-wide priorities or contractual obligations.

Local veto of expense budget items would essentially be identical to local initiative. Though the neighborhoods would not be able to determine their own priorities from an affirmative point of view, they would be able to keep rejecting anything they disliked until the central agency promulgated the programs and priorities which the neighborhood desired.

New York City residents generally recognize that they do not live in isolated communities, but rather in highly complex, interdependent environments. Discussions with Community School Board members, agency Commissioners, and other officials who deal regularly with the public indicate that the vast majority of city residents have neither the time, the interest, nor the willingness to make decisions which fall into the province of paid, full-time, professional government workers. The public, however, does want to be heard, to be kept informed, to get honest answers to questions and to be able to identify the decision-makers. For most people, responsive local government means good schools, regular garbage collections, clean streets, and efficient police and fire protection. The Board of Estimate is deeply involved in the establishment of priorities and in resolving conflicts between various local and city-wide interests. It is impossible to decentralize the conflict resolution mechanism; there must be one final authority as long as the city remains one unit.

The resources of the City of New York are limited, though the demands made upon them are infinite. Therefore, resource allocation is necessary. The Board of Estimate is just one of the bodies participating in this process, but it is the one which has developed systems and expertise in the resolution of conflict between local and city-wide interests. Removing the Board from the budgeting process and transferring its powers to the Mayor, Comptroller, City Council or local governmental units will not obviate the necessity for some sort of strong centralized authority to allocate resources and resolve conflicts. The failure of the city to provide a viable mechanism for resolving its own conflicts will mean that the State, which has ultimate authority for governing the cities, will assume that responsibility.

h) Other relatively minor functions of the Board.

The preceding questions have discussed the major powers of the Board of Estimate. The Board's exercise of these powers on issues with city-wide ramifications would appear to be necessary and appropriate. There are, however, other powers which have been granted to the Board or assumed by it which could be transferred to an agency assigned to the borough or district level.

1. The entire category of items dealing with awards for deaths or injuries to members of the Police and Fire De-

partments could quite easily be removed from the Board's jurisdiction. The Board should not be a "court of last resort," and relatively minor items such as these only encumber the calendar with matters which, while vital to the parties concerned, do not require the application of the Board's special powers.

Item Number 203 (Calendar E)

This item, unanimously approved by the Board, is a typical example of an award being made to the relative of a police or fire officer who died from causes attributed to the discharge of his duties. The function could not be transferred to a local body as boundaries would inhibit expeditious settlement. For example, who would be responsible for allocating an award if a patrolman who lived in District A, was injured in District B, and died in a hospital in District C? Administrative guidelines established by the Comptroller and Corporation Counsel could allow this matter to tbe dealt with effectively by the Department of Personnel. If an appeal for an award were rejected, the matter should then be decided by the courts.

Item Number 206 (Calendar E)

This request for an award for injuries sustained by a private citizen while attempting to prevent a crime is slightly different from the above item in that it does not deal with Police or Fire Department officers. This matter has also been put within the Board's jurisdiction by the Administrative Code, yet there is no reason why it could not be administered by the Department of Personnel following guidelines set by the Comptroller and the Corporation Counsel.

CALENDAR E—July 22, 1971

No. 203

R-154

RESOLUTION for consideration, submitted by the Director of the Budget, awarding Mrs. Julia Tiunis, widow of Patrolman Vincent Tiunis, the sum of $11,724.65, being the annual salary at the time of his death on December 9, 1970 resulting from causes attributed to the discharge of his duties.

On May 20, 1971 (Cal. No. 341), this matter was referred to the Director of the Budget.

REPORT of the Director of the Budget, dated June 24, 1971, stating that Patrolman Tiunis was appointed to the uniformed force of the Police Department on February 1, 1955 and died on December 9, 1970.

Investigation reveals that there is a report on file of the Investigating Officer in which it is stated that Patrolman Vincent Tiunis died of a heart attack on December 9, 1970.

The Investigating Officer reports that Patrolman Tiunis died in the proper performance of police duty, with no contributory negligence on his part.

Chapter 378 of the Laws of 1971, "Heart Bill", states that any condition of health caused by diseases of the heart resulting in death of a paid member of the Police Department shall be presumptive evidence that it was incurred in the performance and discharge of duty.

On April 24, 1971, the Board of Trustees, Police Pension Fund, Article No. 2, upon the recommendation of the Medical Board of the Police Department, granted Mrs. Julia Tiunis an annual pension of $5,906.30 as provided in Section B-18-39.0 of the Administrative Code, City of New York. Section B-18-39.0 provides, in part, that the evidence shall be submitted to such board proving that the death of such member was the natural and proximate result of an accident sustained while a member and while in the performance of duty at some definite time and place and that such death was not the result of wilful negligence on his part.

Section 67-1.0 of the Administrative Code provides that the Board of Estimate is authorized and empowered to make an award to the widow of a member of the Police Department killed while engaged in the discharged of duty. Such award shall equal the annual salary of such member at the time of his death.

For consideration.

CALENDAR E—July 22, 1971

No. 206

R-5172, 9871

IN THE MATTER of a petition of Joseph Cohen for an award, pursuant to the provisions of Section 67-3.2 of the Administrative Code, for personal injuries received by him while attempting to prevent the commission of a crime.

On October 10, 1968 (Cal. No. 120), this matter was referred to the Comptroller and the Corporation Counsel.

REPORT of the Second Deputy Comptroller, dated May 5, 1971, recommending that payment be made to Joseph Cohen in the amount of $890, pursuant to Section 67-3.2 of the Administrative Code and submitting a proposed resolution.

REPORT of the Corporation Counsel, dated June 30, 1971, stating that it is his opinion that the injuries and damage herein resulted from an attempt by the petitioner to prevent "the commission of a crime against the person or property of another, preserve the peace or prevent public disturbances," and that the Board, in its discretion, may compensate the petitioner for the damage sustained by him.

Resolution for adoption.

Exhibit A Annexed to the Affidavit of Werner Kramarsky

2. One administrative matter that should be assigned to a Mayoral agency rather than to the Board of Estimate is the disposal of city records which are deemed obsolete.

Item Number 123 (Calendar D)

Requests for permission to dispose of records come from all sectors of the city government (the Department of Health, Queens County Clerk's Office, Department of Purchase, New York City Transit Authority, etc.). The decision to dispose of such records after it has been approved by the Municipal Archives and Records Center and the Corporation Counsel's office could easily be made by the Mayor's or Comptroller's office. In order to prevent inappropriate disposals, the agency should be required to advertise and provide time for public objection and legal action.

3. Other items which the Board has to approve which are purely administrative, and which could be dealt with at another level by other agencies include: the settlement of illegal but equitable claims, the release of bonds, and the payment of refunds in connection with petitions for the release of property.

Item Number 120 (Calendar A)

Claims which the Comptroller brings to the Board as illegal but equitable and proper to be paid (Section 93 (d) —3.01 of the Administrative Code) usually involve work completed in excess of what was specified in the contract, or matters where an excess of money was spent above what was stipulated in the contract.

These claims are first brought to the notice of the Comptroller who confirms that, in fact, the monies claimed have been spent and for a just purpose. The resolution is sent

CALENDAR D—March 11, 1971

No. 123

R-9370

RESOLUTION for adoption, authorizing the destruction of certain old records of the Department of Health deemed to have become useless due to obsolescence, pursuant to the provisions of Section B49-13.0 of the Administrative Code.

COMMUNICATION dated October 21, 1970, from the Secretary, Department of Health, recommending the destruction of the obsolete records.

REPORT of the Director, Municipal Archives and Records Center (Office of Communications Services), dated October 27, 1970, recommending the destruction of the obsolete records.

CERTIFICATE of the Corporation Counsel, dated February 17, 1971, stating that the destruction of the records will not affect the interest of the City in any pending, anticipated or contemplated claim, action or proceeding by or against the City.

Resolution for adoption.

CALENDAR A—January 14, 1971

No. 120

R-9058

RESOLUTION for adoption, submitted by the Deputy Comptroller, authorizing the payment of $550 to Coffey and Levine, Architects, for money alleged to be due in connection with work performed under Contract No. 201851 entered into with the Department of Parks for the design and reconstruction of a portion of the East River Park in the Borough of Manhattan.

REPORT of the Deputy Comptroller, dated December 14, 1970, certifying that the claim is illegal but equitable and proper to be paid if the Board, by unanimous vote, determines that the public interest will be served by payment thereof.

Resolution for adoption *(requiring a unanimous vote)*.

No. 161

R-3427, 9064

IN THE MATTER of a request for the release of a bond in the sum of $4,500 deposited by Janel Construction Co., Inc., for Hilja Housing Corp., in connection with the closing of Barnes Avenue, Borough of The Bronx.

On June 18, 1970 (Cal. No. 266), this matter was referred to the Corporation Counsel. On July 23, 1970 (Cal. No. 140), this matter was referred to the Department of Highways and the Department of Parks.

REPORT of the Acting Corporation Counsel, dated July 13, 1970, stating that the Board on October 9, 1969 (Cal. No. 23-A), accepted agreements dated October 17, 1966 and August 14, 1969 and the above referred to bond which provides that Janel Construction Co., Inc. will transport the rock excavations on its property within and abutting the lines of Barnes Avenue as required by the Department of Highways to the Hutchinson River Parkway areas as directed by the Department of Parks.

If the Department of Highways and Department of Parks will report to the Board that said work has been completed to their satisfaction, there being no further need for the security, the Board may adopt a resolution releasing the same as requested.

REPORT of the Transportation Administration, dated September 1, 1970, recommending that said bond be released.

REPORT of the Parks, Recreation and Cultural Affairs Administration, dated December 9, 1970, recommending release of said bond.

Resolution for adoption.

Exhibit A Annexed to the Affidavit of Werner Kramarsky

to the Board by the Comptroller and requires a unanimous vote. If advance notice of these claims was given, and if they were posted in the City Record for public scrutiny, there is no reason why the Comptroller's decision (subject to the Corporation Counsel's approval) should not be final.

Item Number 161 (Calendar A)

This request for release of a bond is a simple administrative matter with which the Comptroller could deal after the required investigation by the Corporation Counsel and the appropriate agencies.

Item Number 96 (Calendar E)

This resolution for the payment of a refund falls under the Board's power to dispose of city property. After an investigation by the Department of Real Estate and the Corporation Counsel, the matter could be easily handled by the Comptroller's office because it is administrative.

4. Although all retirement and pension matters were removed from the Board's jurisdiction over three years ago, Title C of the Administrative Code under the heading *Board of Estimate* (Section C-3-1.0 pertaining to the authority to recommend retirement, etc.,) is still within the Board's jurisdiction. There appears to be no persuasive reason why this power remained with the Board. (See Item Number 214, Calendar F)

. . . . . .

Note: There are other minor functions which the Board is empowered to undertake through state legislation which, in fact, could be removed from its jurisdiction. Although some of these powers do not pertain to Charter revision, a full listing of all the powers granted to the Board will be found in Appendix "A." The distribution of Board of Estimate responsibilities to other agencies as discussed in this section relates not to the issue of decentralization, but rather to rationalizing the functions of the Board.

CALENDAR E—July 22, 1971

No. 96

R-13412

RESOLUTION for consideration, recommended by the Commissioner of Real Estate, authorizing the payment of a refund from the Real Property Fund in the sum of ($200.00) without interest, costs or other charges to August Canossa and Josephine Canossa both residing at 2443 East 16th Street, Brooklyn, N. Y. which sum was deposited in connection with a petition for a release of the City's interest in a portion of Emmers Lane (Block 7418 adj. to Lot 70), Borough of Brooklyn (Committee Cal. No. 284).

On September 8, 1970 (Cal. No. 49) the Committee on Acquisition and Disposition of City Property referred this matter to the Commissioner of Real Estate for report.

REPORT of the Commissioner of Real Estate, dated June 30, 1971 stating that in a communication dated May 13, 1971 the Corporation Counsel advised that the City's interest in the property is merely an alleged "Cloud on Title" and in such cases the City of New York will only give a release to an abutting owner if such owner already has title to the underlying fee and can establish that fact by a recognized title company policy. In this instance neither the City nor the petitioners are the owners of such underlying fee title and in view of this petition for the release of the City's interest in the subject parcel to the petitioners must be denied.

It is recommended that the petition of August and Josephine Canossa be denied and that the sum of $200 deposited with the petition be returned to the petitioners.

For consideration—one resolution.

CALENDAR F—November 11, 1971

No. 214

R-999

COMMUNICATION dated October 28, 1971, from the Office of Probation, requesting the retirement of Mrs. Madeline M. Thulin, Clerk, Office of Probation, Borough of Manhattan, pursuant to the provisions of Section C3-1.0, C3-2.0 and C3-3.0 of the Administrative Code.

Refer to the Comptroller.

Exhibit A Annexed to the Affidavit of Werner Kramarsky

i) Should the Board remain in existence, its powers unaltered, and voting composition unchanged, or merely as an advisory body, with no administrative or executive powers?

As previously discussed, the Board of Estimate is so much an integral part of the governmental process in New York City that it has proved impossible to abolish or dissolve it. Despite the public complaints about responsiveness and accountability, one must recognize the cohesive role of the Board as it functions to resolve conflicts between city-wide and local interests, as well as in settling of inter-agency disputes.

This organic need for a small, elected body responsible for setting policy on matters relating to the city and its people has always been reflected in past charter revisions. It is noteworthy that the 1935 Charter Revision Commission, which sought to provide a simpler and better organization for the city's government, deliberately retained the Board of Estimate. The proposed Charter of the 1960 Moore Commission, a powerful advocate of decentralization, also favored retention of a "development board," although taking away all budgetary and financial responsibility. (It is ironic to note that the original functions of the Board of Estimate were primarily fiscal).

Recommendations have also been made that the Board continue in existence but with a different composition. In addition to changes in the distribution of voting power, it has been suggested alternatively that the Mayor, Comptroller, or City Council President not serve on the Board. Those who suggest that the Mayor not serve on the Board, but execute the policies of the Board are, in essence, trying to move the mayoralty toward a city manager concept. The desire to de-politicize the Office of the Mayor, to re-

move him from the policy making process, is not now a reasonable expectation. The public, although critical of a particular Mayor, sees the office as the most specific focus for community protest. The turnout for general elections for Mayor indicates a public desire to select an individual for the execution of stated policy goals. It is possible that the city manager, an employee of a board of directors, may be preferred at some future time; even then it would probably be desirable to have him serve as a voting member of such a board.

Furthermore, the notion of de-politicizing the Mayor's office is not realistic in a city as diverse as New York. The thesis that there exists, underlying the conflict and strife, a basic governmental policy which can command unanimous support among the various elements of the city is based on an idealized vision of the city's residents. The conflicts are real and the stakes may be as high as one's home or residence. In such circumstance, leadership does make a difference.

The most frequent criticism of the Board relates to the position of the President of the City Council. Without entering into the common argument that the office should be abolished and its place taken by the Majority Leader, it is necessary to evaluate the position of this city-wide elected official on the Board. It is certainly appropriate to deny his position on the Board on the basis of his not representing the membership of the City Council, since he is not elected by the members of the Council nor is he in sufficiently close political dialogue with them for representation purposes. However, the relationship between the Council President and Council members individually provides an opportunity for the legislators to have their views made known to the Board of Estimate. This, however,

should not be seen as the primary reason for the retention of the Council President or an equivalent on the Board of Estimate. Each of the members of the Board as presently structured has day to day operating responsibilities and direct and constant intercourse with line agencies of the city government; only the Council President does not. It is useful and desirable to the deliberations of the Board of Estimate to have the guidance of a city-wide elected official not so burdened and involved.

The argument for denying the Comptroller a position on the Board of Estimate is generally linked with the concept of changing the position to an appointive one. Proponents of this view claim that the Comptroller's office duplicates the functions of the Bureau of the Budget. It is not appropriate to discuss here the significant differences between the Budget Bureau and the Comptroller's office. Suffice it to say that they are substantive as well as political. That is not to say that there are not areas of overlap. However, under the present construct, these serve a necessary purpose.

The Budget Bureau is a Mayoral agency (despite the fact that it provides expert opinion for other elected officials) and as such prepares its reports to serve the policies and priorities of an administration headed by the Mayor. The Comptroller's office, headed by a publicly elected official, has sufficient expertise and is sufficiently autonomous to critically analyze and, where necessary, contest the claims of the Budget Bureau. The traditional rivalry between the Comptroller and the Mayor may delay the processes of the Board, but in the final analysis, it serves to enlarge the public discussion and the availability of facts and figures.

These three officials are concerned with the welfare of the city as an entity; it is left to the Borough Presidents

to add local sentiment and opinion to the Board's deliberations. Needless to say, the Borough Presidents are equally as concerned with city-wide policy as are the other members of the Board. It must be recognized, however, that they are often subjected to more intense local pressures. The greater availability and accessibility of the Borough Presidents for personal consultations, conferences, meetings, and inspections is of tremendous importance to the citizens of a borough. The ability of the community leaders to bring their problems directly to the Borough Presidents contributes to citizen participation in government. It is unique to the office that a Borough President, as a member of the Board of Estimate, is able to approach the solution of local conflicts with an intimate knowledge of city-wide problems, policies and programs. Bringing the attributes of chief executive of his borough to the deliberations of the Board is a vital balancing force. Former Mayor Wagner, concurring with this concept, has noted that at the time he held office people perceived the Borough Presidents' offices as receptive conduits into the governmental decision-making process.[25]

It must be pointed out that the present balance of the Board of Estimate votes provides the city-wide elected officials, acting in unison, with a clear majority. Should the composition of the Board be altered or voting power be reallocated, the question of prevailing power must be resolved. It may be argued that three city-wide officials are less apt to act in concert than are two such officials, particularly if the issue before them is controversial. Thus, the two questions that need to be answered when discussing the distribution of votes are: (1) whether or not the city-wide officials should hold a majority of votes, and (2) whether or not the Borough Presidents' votes should be redistributed according to population?

The answer to the first question is "yes." Even those who advocate removing the City Council President from the Board suggest that the two remaining city-wide officials get six votes each and the five Borough Presidents two votes each, thereby maintaining the city-wide officials' majority. Giving the local members a majority (be they Borough Presidents, Councilmen-at-Large, or other representatives chosen by a segment of the city) would tend to lead to the re-creation of the oft-cited Borough President's veto. It is not difficult to imagine that any Borough President would hesitate to vote for a project opposed by another Borough President for fear of retaliation at a politically inconvenient moment. Therefore, most projects would be subject to an absolute approval of the resident representative. Consequently, major projects like the water tunnels might never be built or at least might be unduly delayed by neighborhood opposition. The political liabilities inherent in such projects would be highly evident and personalized; political survival strategies rather than merit consideration would tend to prevail in determining the fate of the project. In short, shifting a majority of the votes to the local members of the Board of Estimate would seriously undermine the Board of Estimate's ability to protect city-wide interests.

The question of whether or not the Borough Presidents' votes must be reapportioned is one that has already been decided by the courts in *Bergerman* v. *Lindsay*.[26] In any case, keeping control of the Board with its city-wide members and reapportioning the Borough Presidents' votes according to population would reduce the Borough President of Staten Island to the status of an observer in the Board's deliberations.

Exhibit A Annexed to the Affidavit of Werner Kramarsky

Conclusion

This study has presented an analysis of the scope of the Board of Estimate's activities as it presently exists. It has further analyzed some alternatives in the nature of administrative or political decentralization. It would be impossible, however, to consider the report complete without a brief discussion of the distinctions between the functions of the Board of Estimate and the functions of those agencies of government which are directly related to the delivery of services.

Without taking a position in the argument that has been extensively made that there has been a diminution of services, and without granting the assumption that decentralization, either political or administrative, would improve or expand such services, it is well to note that the Board of Estimate is not and cannot be considered a services-related agency. It therefore must be studied quite separately from those agencies which are affected by government attempts to respond to citizen concerns over the delivery of service.

Obviously, the Board of Estimate participates as a policy-setting body in solving these problems, but in no way does it direct the delivery of services designed to implement the policies.

The criterion used for determining whether or not any of the Board's functions could be reassigned was to decide whether or not the particular power exercised served a local or city-wide interest. It was found that the overwhelming majority of the Board's functions dealt with matters which served the interests of the city as an entity and which could only be decided by a central policy-making organ.

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The greatest volume of controversy surrounds the prerogatives of city planning. There is virtually no argument about the inevitable city-wide impact of changes in the mapping or zoning of particular areas. However, the immediate unique issue is often viewed as "purely local" in its effect.

Any Charter Revision Commission would find the need to create an institution which would have an overview of the affairs of the city. This is the position the Board of Estimate has held for a hundred years, and there seem to be no pressing arguments for change.

Exhibit A Annexed to the Affidavit of Werner Kramarsky

References

1. New York State Commission on the Governmental Operations of the City of New York, (Moore Commission.) *Interim Report,* 85ff.
2. *Id.; Greater New York Charter* (Ash, 1897) cxii.
3. *Greater New York Charter* (1897) Paragraph 74.
4. New York State Charter Revision Commission (1900).
5. *Greater New York Charter* (1901).
6. Laws of 1905, c. 629, Paragraph 14.
7. Laws of 1911, c. 679.
8. Laws of 1916, c. 497.
9. Laws of 1920, c. 427.
10. Laws of 1924, c. 363.
11. *Report of the Joint Legislative Committee to Investigate the Affairs of the City of New York,* (December 28, 1932) p. 6.
12. *Report of the New York City Charter Revision Commission,* 1936. (Thacher Commission), p. 7.
13. *Id.,* 18 et seq.
14. *Childs* v. *Moses,* 1942.
15. New York City Charter, 1936.
16. *New York Herald Tribune,* April 28, 1936.
17. Laurence A. Tanzer, *The New York City Charter* (New York: Clark Boardman Co., Ltd., 1937) p. 480.
18. Bergerman v. Lindsay, 58 Misc. 2d 1013, 297 NYS 2d 421 1969).

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19. Bergerman v. Lindsay (58 Misc 2d 1015).
20. Bergerman v. Lindsay (25 NY 2d 409).
21. Laurence A. Tanzer, *The New York City Charter,* p. 480.
22. *Ibid.,* p. 491.
23. Matter of Ungar (Wagner, 20 Misc. 2d 403, 195 N.Y.S. 2d 2 (1961).
24. Corporation Counsel of the City of New York Opinion No. 107, 737.
25. Testimony before the Temporary State Charter Revision Commission, December 5, 1972, p. 5648.
26. Bergerman v. Lindsay (25 NY 2d 409).

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APPENDIX "A"

The powers granted to the Board of Estimate fall into the following seven major categories.

I. Use of Property of/For City

The Board may:

1. Grant leases of city property, concessions for use of city property, and enter into leases of property to city for city use. (67.1)*
2. Use city property for any public purpose. (67.2)
3. Withdraw from E.D.A.* and assign for other use, or transfer to the jurisdiction of any other agency, any wharf property owned by the city but not under lease. (1303.2.a)
4. Approve leasing city wharf property. A person who has a proposed lease turned down by administration may submit it directly to Board of Estimate. (1303.2.f)
5. Approve establishment of camps in parks to furnish free instruction and maintenance to children between ages of six and sixteen. (Administrative Code 67-4.0)
6. Pass upon all applications to lease any real property for the purpose of the city. (Administrative Code 67 (1)-1.0)
7. Transfer the jurisdiction and control of any street from one agency to another. (Administrative Code 67 (2)-1.0)

* Economic Development Agency.

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8. Grant to Fire Department locations on any public property. (Administrative Code 67 (2)-2.0)
9. Set aside for neighborhood recreation, playground, etc., land or building owned by municipality not devoted to other public use. (General Municipal Law 241)
10. Pass resolution authorizing condemnation or acquisition of property and franchises of persons, firms or corporations used in operation of omnibus lines entirely within city. (General City Law 20, 20d)
11. Designate any building in city to be common jail. (Administrative Code 67 (2) 3.0)
12. Designate any lands owned by city for public market. (Agriculture & Markets Law 267)
13. Designate for use as a central live poultry market any land owned or leased by city. (Agriculture & Markets Law 267 (a))

II. Public Improvements

The Board may:

14. Authorize "physical improvement" other than by city pursuant to definition in Section 211.l (d) on application of interested owner of real property. (229)
15. Authorize initial payment of costs incurred by Department of Highways to pave sidewalks, etc., pursuant to Section 230, a. (230.e)
16. Approve terms whereby city may repair, improve sidewalks, etc. (230.e)

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17. Approve E.D.A. licensing and permit private owners of wharf property to make necessary improvements on property, etc. (Administrative Code 703-3.0)

18. Pass resolution establishing a recreation commission to equip, operate and maintain playgrounds and recreation centers. (General Municipal Law 243)

19. Concur with "governing board" of municipality to construct and maintain a memorial in commemoration of U.S. soldiers, sailors. (General Municipal Law 77-a)

III. Disposal of Property

The Board:

20. Must approve dispositions of real property of city, unless power expressly vested in another agency. (384.a & b)

21. May give to person a grant or conveyance of right, upon payment of amount allowed by law, to land lying within closed and discontinued street. (Administrative Code 323-2.0)

22. Directs Commissioner of Real Estate in regard to legal and financial matters concerning all property owned by the city. (Administrative Code 1082-1.0)

23. May provide conditions of sale of city's real property; property reverts to city if conditions are not met. (Administrative Code 384-1.0-6.0)

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24. Many authorize conveyance of city property where Mayor has authorized acquisition of lands of private owners which are to be exchanged for such lands by city. (Administrative Code 384-7.0)

IV. City Planning and Zoning

The Board:

25. May approve City Planning Commission recommendations in regard to changes in city map and master plan; can override City Planning Commission by ¾ majority. (199.b, c)

26. May approve regulations for action on zoning laws, recommendations by City Planning Commission (200.2) If landowners protest, resolution not in effect unless ¾ of Board approves. (200.3)

27. Must give approval before filing of map of subdivision or platting of land. (202.a)

28. Must pass resolution to construct and use for private purposes pipes, conduits, tunnels under railroad tracks, and connecting bridges over streets of city. (374)

29. May approve setting aside unleased wharf property belonging to city by administration for general wharfage purposes, special kind of commerce, etc. (1303.2.h)

30. May approve changes in the waterfront plans of the city by administrator. (1304.1)

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31. May approve changes by administrator of width or location of piers, and build or rebuild temporary wharf structures. (1304.2)

32. May direct Commissioner of E.D.A. to prepare plans for terminal facilities; may take necessary steps if plans include narrowing or widening of streets, etc. (Administrative Code B29-2.0)

33. May cause Board of Water Supply to make studies of city's water supply; may approve map or plan covering entire work of this article. (Administrative Code K51-3.0)

34. By resolution may create city planning commission. (General Municipal Law 234)

35. Must act whenever the local legislative body is authorized to take action under Article 14 (airports and landing fields.) (General Municipal Law 353) The Board also has powers under Title I of the Housing Act of 1944 and Articles II and V (Section 36A, 150) of the Private Housing Finance Law.

V. Contracts and Franchises

The Board:

36. Shall regulate sealed bids for contracts or public letting where work and/or supplies to be furnished exceeds $2500, except where by ⅔ vote Board orders otherwise (343.a), or by ⅔ vote may authorize bid which is not lowest. (243.b)

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37. Shall regulate procurement or order awarded lowest bidder where work and/supplies to be furnished do not exceed $2500. (344.a)

38. May, by ⅔ vote, and with approval of Mayor, authorize the purchase of a patented article as to which competition cannot be secured. (348)

39. Has jurisdiction over consultant contracts. (349.a, b)

40. Has exclusive right in behalf of city to grant franchises, make contracts involving use of streets. (362)

41. Authorizes and executes contracts for every grant of or consent to a franchise, or modification thereof. (363)

42. Must authorize by ¾ vote a resolution authorizing a proposed contract. (372)

43. May direct changes to be made in the form of contracts as interests of city require (otherwise Corporation Counsel shall approve as to form). (394.b)

44. Shall fix rates and charges for wharfage, cranage, and dockage. (1303.2.i)

45. May, if work abandoned by any contractor, approve appropriate agency adopting all subcontracts made by such contractor for such work. (Administrative Cod 343-1.0c)

46. May by unanimous vote extend time for performance of any contract. (Administrative Code 343-2.0) May by unanimous recommenda-

tion permit Comptroller to release contractor from any fine or penalty incurred under a contract. (Administrative Code 343-3.0)

47. Shall prescribe regulations as to the manner that such bidder whose bid is accepted shall give security for faithful performance of contract. (Administrative Code 343c-1.0)

48. Must approve Commissioner of Water Supply entering into contract with person supplying or selling water. (Administrative Code 734 (2)-3.0)

49. May make contract with corporation for furnishing special water for fire, sanitary, and other purposes, etc. (Administrative Code 734 (2)-3.0)

50. Shall fix rates which Commissioner of Sanitation may charge for collection of ashes, garbage, etc., from businesses, etc., conducted for profit. (Administrative Code 755 (2)-3.0)

51. May approve agreement to provide for sale of lands under water inside high waterline, and purchase of lands outside of line, from upland owners of land. (Administrative Code 755(2)-3.0)

52. Shall set regulations for tax exemptions, reimbursements, etc., in contracts with railroad development company providing passenger service by railroad to or from stations in city. (General City Law 21c)

53. Shall approve rules (Section 269) set by E.D.A. to govern, control, etc., Department of

Markets in New York City. (Agriculture & Markets Law 270)

54. Must grant approval in order for the city to sell, lease, convey, exchange or otherwise make available to the Dormitory Authority, for a minimal consideration, any interest in real property of the city. (Education Law 1680, Community Colleges)

55. Must approve acquisition or leasing of property by city or corporation, and agreements between city and corporation as to use or occupancy of property. (Unconsolidated Laws 8088, Off Track Betting Corporation)

56. Must approve contracts of Off Track Betting Corporation. (Unconsolidated Laws 8090)

VI. Budgetary and Financial Matters

The Board:

57. May increase, decrease, or omit any unit of appropriation in budget as submitted, subject to veto of the Mayor. (120)

58. May restore or omit budget increases, reductions, omissions, etc., by ⅔ vote (without the Mayor voting) and with separate concurrence of the City Council. 121.c)

59. May, with the City Council, authorize use of cash in the tax appropriation and general fund stabilization reserve fund in excess of 30% of tax levy for current fiscal year for reduction of taxes in any succeeding fiscal year. (128.c)

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60. May increase, etc., amount of appropriation for any capital project proposed, add any new capital project, change any terms thereof. (222)

61. May, by vote of ⅔ (except Mayor), restore or omit such increase, reduction, omission, addition or change vetoed in capital budget. (223.c)

62. May amend capital budget upon receipt of recomendation of ⅔ of City Planning Commission, the approval of the Mayor, and the concurrence of the City Council. (224.a)

63. Shall, upon direction of the Mayor cause a public hearing to be held, and may after such hearing direct project initiation. (228)

64. May authorize Comptroller to authorize expenditure of monies in real property fund for payment of charges city is required to pay under lease of real property owned by city and leased to others, and for payment of costs incurred in maintenance, etc. (252)

65. May authorize Comptroller to purchase from city at par its short term obligations or short term obligations of U.S. out of cash from sinking fund. (275)

66. May fix for any agency aggregate expenditure for supplies of less than $2500, or more not in excess of $5000 in any one calendar month. (342.c) Agency may make emergency purchase not in excess of $500. (342.d)

67. Must approve E.D.A. fixing charges for supply of water, etc. (1403.4(a) (4))

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68. May make award to widow or children of uniformed Police or Fire Department officer killed in discharge of duty. (Administrative Code 67-1.0)

69. May make award to widow of prison guard killed in discharge of duty. (Administrative Code 67-3.0)

70. May make award to spouse of school crossing guard killed in discharge of duty. (Administrative Cod 67-3.0)

71. May make award to spouse of any officer or employee of city killed in the discharge of duty. (Administrative Code 67-3.1)

72. May make award for death or injury of any person, other than peace officer, which shall be caused on transit facility in attempting to prevent commission of crime. (Administrative Code 67-3.2)

73. May determine any claim against city or agency when Comptroller certifies that claim is illegal, invalid. (Administrative Code 93 (d)-3.0)

74. May, upon written approval of Comptroller, cancel and annul all taxes, assessments and water rents and sales to city which become lien against any real estate owned by any corporation. (Administrative Code 93(d)-9.0)

75. Shall levy for, collect and pay monies to satisfy a final judgment against city. (General Municipal Law 83)

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76. Must appropriate necessary lands and buildings before a public general hospital may be built. (General Municipal Law 126)

77. May award compensation for death or injury to any person (1) caused by policeman engaged in performing duties, or (2) resulting from assistance furnished to police officer in performance of duties. (Administrative Code 93 (d)-4.0)

78. May reapportion the cost of an assessable improvement authorized prior to January 1, 1962, except where portion of the cost is to be borne in whole or part by the property benefited and the final cost exceeds the estimated cost by 10%. (General Municipal Law 1149 (a); and 1936 Charter 303)

79. May designate commission, association, or person for burial of members of armed forces of U.S. and families; headstones. (General Municipal Law 148)

VII. OTHER

The Board:

80. Shall authorize disposal of absolescent city records. (Administrative Code B.49.13.0)

81. Shall approve recommendation for retirement of personnel. (Administrative Code C.3.0)

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* Unless noted, all citations refer to sections in the New York City Charter.

APPENDIX "B"

RESOLUTION

Adopted by the

BOARD OF ESTIMATE

of

THE CITY OF NEW YORK

January 25, 1968

(Cal. No. 18)

RULES OF PROCEDURE

For the Conduct of the Business of the Board of Estimate

RULES OF PROCEDURE
FOR THE CONDUCT OF THE BUSINESS OF THE BOARD OF ESTIMATE

Resolved, By the Board of Estimate, that the following Rules of Procedure for the Conduct of the Business of the Board are hereby adopted:

1. The regular meetings of the Board shall be held on the second and fourth Thursdays of each month at 10.30 a. m. in the City Hall, Borough of Manhattan, or as otherwise directed by the Board. The first meeting of each year shall be called by the Mayor upon due notice (Section 63, New York City Charter).

2. Special meetings may be called by the Mayor or by Members of the Board casting 12 votes.

3. Notice of all special meetings shall be sent to each member by the Secretary.

4. The Mayor, or in his absence the President of the Council, shall preside at all meetings (Section 63, New York City Charter).

5. The Mayor, the Comptroller and the President of the Council shall each be entitled to cast four votes and the President of each Borough shall be entitled to cast two votes (Section 62-a, New York City Charter).

6. A quorum shall consist of members in attendance casting 12 votes, including at least two members authorized to cast four votes each (Section 62-d, New York City Charter).

7. Members, or those acting in their places as authorized by the Charter, shall attend the meetings of the Board and shall remain during the session, unless excused by the Chair. A request to be excused shall be formally made and entered upon the record.

8. (a) Except as otherwise provided in the Charter or by law, the Board shall act by resolution adopted by a majority of the whole number of votes authorized to be cast by all the members of the Board (Section 62-b, New York City Charter).

(b) No resolution or amendment of any resolution shall be finally passed except at a meeting open to the public (Section 62-c, New York City Charter).

9. The Chair shall direct a roll call upon every proposition to be acted upon and all votes shall be taken by the ayes and nays. The vote of any member "not voting" shall be considered a negative vote.

10. The vote upon every proposition voted upon shall be recorded in the minutes.

11. A member may be excused from voting upon any proposition upon his statement of disqualification which shall be passed upon by the Chair, or for other reasons which shall be passed upon by a majority of the votes of the members of the Board present.

12. A unanimous vote is required in the following instances:

(a) Consideration of matters not on the calendar.

(b) Authorizing payment of equitable claims certified by the Comptroller. (Section 93d-3.0, New York City Administrative Code.)

(c) Awarding compensation for the death of or injury to any person: (1) caused by a police officer engaged in performing certain duties; or (2) resulting from assistance furnished to a police officer in the performance of his duties. (New York City Administrative Code, Section 93d-4.0.)

(d) Canceling taxes, assessments and water rents against real estate owned by organizations entitled to exemption. (Sections 93d-9.0 and 93d-10.0, New York City Administrative Code.)

(e) Extending the time for the performance of contracts. (Section 343-2.0, New York City Administrative Code.)

(f) Authorizing the Comptroller to release any contractor from any fine or penalty incurred under a contract. (Section 343-3.0, New York City Administrative Code.)

(g) Delegation to any member or committee of the Board of the power to act or hold hearings on any matter within its jurisdiction other than matters included in Chapters 6, 8, 9 and 14 of the Charter. Such delegation shall not apply to any particular matter specified by any member in a notice filed with the Secretary of the Board. (Section 65, New York City Charter.)

13. A three-fourths vote is required in the following instances:

(a) The adoption of a resolution or amendment of any resolution at the same meeting of the Board at which it is originally presented (Section 62-c New York City Charter.)

(b) Granting franchises or rights to use any street or railroad, pipe or other conduits or ways or otherwise for the transportation of persons or property or the transmission of gas, electricity, steam, light, heat or power, or the installation of transformer vaults, not less than 27 days after the form of contract and resolution of the Board authorizing the same shall have been entered upon the minutes of the Board and public hearing held thereon. (Sections 362, 370, 371 and 372, New York City Charter.)

(c) Approving additions to or changes in the City Map which have been disapproved by the City Planning Commission or upon which the City Planning Commission shall have failed to make a report within ten weeks from the date of referral by the Board (Section 199-b, New York City Charter.)

(d) Reapportioning the cost of an assessable improvement authorized prior to January 1, 1962, unless the final cost shall exceed the estimated cost by more than 10 per cent. (Section 1149, New York City Charter and Section 303 of 1936 New York City Charter.)

(e) Approving subdivision maps or plattings of land disapproved or not reported on by the City Plannnig Commission within ten weeks after referral by the Board. (Section 202-a, New York City Charter.)

(f) Approving, disapproving or modifying resolutions of the City Planning Commision recommending changes in the Zoning Resolution where protests thereon have been presented to the Secretary of the Board of Estimate within 30 days from the date of the filing of such recommendations by the City Planning Commission, such protests duly signed and acknowledged by the owners of 20 per cent or more of the areas of: (1) the land included in such proposed changes; or (2) the land immediately adjacent extending 100 feet therefrom; or (3) the land, if any, directly opposite thereto extending 100 feet from the street frontage of such opposite land. (Section 200, New York City Charter.)

(g) Authorizing zoning changes certified as necessary by the Mayor to the City Planning Commission and which have been disapproved by the City Planning Commission. (Section 200, New York City Charter.)

(h) Authorizing exchange of lands of The City of New York for lands of private owners within the same Borough. (Section 384-7.0, New York City Administrative Code.)

(i) Authorizing the Commissioner of Marine and Aviation to widen, open, construct, abandon or close any marginal street or avenue, which proposals have been disapproved by the City Planning Commission or found by it not to be in accordance with the Master Plan. (Section 703-c, New York City Charter.)

(j) Approving the terms of any lease of City-owned wharf property not sold at public auction duly advertised in THE CITY RECORD. (Section 707-a, New York City Charter.)

(k) Approving the terms of a proposed lease of wharf property submitted by a proposed lessee and which are not recommended by the Commissioner of Marine and Aviation, provided such approval is granted at the meeting of the Board at which the proposed lease shall have been presented or at any one of its three regular meetings next succeeding thereto. (Section 707-c, New York City Charter.)

(l) Authorizing the sale of market property. (Section 384-5.0, New York City Administrative Code.)

14. A two-thirds vote is required in the following instances:

(a) Suspension of these rules at any meeting by a two-thirds vote of all members present. (Section 65, New York City Charter.)

(b) Authorizing the purchase of patented articles other than medical or surgical specialties, for which competition cannot be secured. (Section 348, New York City Charter.)

(c) Approving expenditures in excess of two thousand five hundred dollars without public letting. (Section 343-a, New York City Charter.)

(d) Approving award of contracts to other than the lowest responsible bidder.

(Section 343-b, New York City Charter.)

(e) Waiving minimum wage and other stipulations in contracts of the City for supplies, materials, equipment, work, labor or services. (Section 343-9.0(d), New York City Administrative Code.)

(f) A two-thirds vote of the Board (other than the Mayor) overriding vetoes of the Mayor on changes made by the Board in the Capital Budgets and Expense Budgets as originally submitted by the Mayor pursuant to Chapters 6 and 9 of the New York City Charter. (Sections 121-c and 223-c New York City Charter.)

(A unanimous, four-fifths, three-quarters, two thirds or majority vote shall be required in other instances as required by law.)

15. Members of the Board of Estimate and City employees designated by the Board shall be the only persons assigned within the guard rail of the dais during meetings of the Board or its committees.

16. Members of the Board shall be addressed in the third person and by title only.

17. (a) At public hearings those opposed to a proposition shall be heard first and then those in favor thereof, unless otherwise ordered by the Chairman of the Board.

(b) The Board, either prior, at the commencement of, or during the course of, any public hearing may establish a limit upon the time available to each member of the public for speaking at a public hearing, whenever the Board deems this necessary for the proper and orderly performance of its functions and for the convenience of the public. The Board may also, in its discretion, establish a general rule, pertaining to limits upon time available to speakers, applicable to all public hearings before the Board.

18. The order of business before the Board shall be as follows:

(a) Roll Call

(b) Approval of minutes of previous meetings.

(c) Public hearings (including hearings adjourned).

(d) Matters laid over on which public hearings have been closed or on which public hearings are not required.

(e) Reports:

From standing Committees;

From select and special committees;

From the Mayor;

From the Office of the Comptroller;

From the Bureau of the Board;

From City, Borough, County and State officials.

(f) Communications, petitions and resolutions for consideration by the Board; or to be referred to Bureaus of the Board, to Committees of the Board or to City Officials:

(a) From citizens and public bodies;

(b) From City, Borough, County and State officials

(g) Calendar—New York City Employees' Retirement System.

(h) Calendar—Health Department Retirement Fund.

19. The standing committees of the Board shall be as follows:

(a) The Committee of the Whole—which shall consist of all the members of the Board and shall meet at the call of the Mayor.

(b) The Committee on Acquisition and Disposition of City Property, which committee shall consist of the Mayor, the Comptroller and the President of the Council. All matters involving the acquisition and disposition of City property may be referred to such committee for report prior to action by the Board.

(Temporary or permanent chairmen of such committees shall be designated by the Mayor.)

20. All special and select committees shall be appointed by the Chair, unless otherwise ordered by members of the Board casting at least 12 votes.

21. Meetings of the committees shall be subject to the call of the respective chairmen.

22. All committee reports presented to the Board shall be signed by a majority of the committee, unless otherwise ordered by the Committee. However, a minority report may be presented and shall be part of the record.

23. Reports made to the Board by committees or agencies shall be in writing, with a statement of facts and conclusions. Such reports shall also state the date when the subject matter was referred to the committee or agency and the calendar number of such reference. Where such reports contain recommendations for action by the Board they shall be accompanied by proposed resolutions designed to effect such recommendations.

24. Matters which have been referred to a committee shall not be acted upon by the Board until such committee has either reported on the matter or such committee has been discharged from further consideration thereof by the Board.

25. A matter pending in committee may be withdrawn therefrom by members of the Board casting at least 12 votes, or such committee may in like manner be discharged from further consideration thereof.

26. All reports upon references shall constitute a part of the record of the proceedings of the Board.

BUREAUS OF THE BOARD

27. The Bureaus of the Board shall be as follows (Section 68, New York City Charter):

Bureau of the Secretary
Bureau of Franchises
Bureau of Retirement and Pensions

28. The above Bureaus shall submit reports on matters referred to them by the Board and shall render all technical and clerical advice and assistance directed or called for by the Board, its members or its several committees.

CALENDARS AND MINUTES OF PROCEEDINGS

29. Every communication, petition and resolution addressed and presented to the Board by a member of the Board shall be printed on the Calendar. Other communications, petitions and Resolutions requiring action by the Board pursuant to law, shall be listed upon the Calendar in accordance with the rules of the Board. Unless acted on, laid over, referred back or withdrawn, matters on the Calendar shall be referred by the Chair to an appropriate standing committee, to a special committee if so directed by the Board, to the head of a department, a Bureau of the Board or otherwise for consideration and report.

30. The Secretary shall prepare and cause to be printed a Calendar of the business to be presented and considered at each meeting of the Board. The matters thereon shall be arranged in the order prescribed by the "Order of Business" described in these rules. The Secretary shall also keep a record of undetermined matters which have been laid over or are pending in the several standing and special committees of the Board or referred to heads of departments, etc., and not yet reported on, and all communications, etc., pertinent thereto; also applications involving the laying of water mains and other subsurface structures in City streets as to their relation to rapid transit routes and construction.

31. The Secretary shall close the Calendar at 12 o'clock noon seven days prior to the scheduled meetings of the Board.

32. In January of each year the Secretary shall furnish each member of the Board with a list of all matters which have been referred to a committee, head of a department or otherwise and on which reports have not been made to the Board.

GENERAL RULES

33. All communications, petitions and reports intended for the Board's consideration and action shall be addressed to the Board and delivered to the Bureau of the Secretary at least seven days before the meeting at which they are to be presented.

34. All communications and reports directed to the Board (by its committees or heads of departments) shall consist of an original accompanied by thirteen copies thereof, except reports of the Comptroller recommending the cancellation of taxes, assessments

or water rents on properties entitled to tax exemption, and except reports of the Commissioner of Real Estate on leases, renewals of leases or payments of rents of properties for municipal purposes where the annual rentals do not exceed one thousand dollars, and on the sale and demolition of encroachments on City-owned properties.

35. Copies of all communications, petitions and reports addressed to the Board for its consideration and action at meetings of the Board shall be sent by the Secretary to the members at least two days before the scheduled meetings of the Board at which they are to be considered. On default of such delivery, action shall be deferred by the Board upon the request of any member of the Board. Provisions of this paragraph shall not apply to reports of the Comptroller recommending cancellation of taxes, assessments or water rents on properties entitled to exemption, and shall not apply to reports of the Commissioner of Real Estate on leases, renewals of leases or payments of rents of properties for municipal purposes where the annual rentals do not exceed one thousand dollars and on the sale and demolition of encroachments on City-owned properties.

36. Petitions for franchise rights and privileges and applications for revocable permits for the occupancy of streets or the subsurface thereof shall be made to the Board in duplicate and verified, and shall set forth in full the facts in regard to and the reasons for the application.

37. The Secretary shall cause the proceedings of each meeting of the Board to be printed in THE CITY RECORD and shall thereafter cause the same to be printed and bound in volumes of convenient size, with an index thereto. Copies thereof shall be furnished to the members of the Board.

38. The Secretary shall transmit to the Mayor certified copies of the resolutions of the Board requiring the Mayor's separate approval and, when such resolutions have been approved the Secretary shall so report to the Board at its next meeting.

39. The Secretary shall transmit to the City, Borough and County departments, agencies or officials certified copies of all resolutions adopted by the Board affecting such agencies or officials.

40. Within 30 days after receipt of a communication from the Mayor pursuant to Section 228-a of the Charter, the Secretary of the Board shall publish in THE CITY RECORD a notice of public hearing not less than 10 days prior to date of said public hearing.

A true copy of resolution adopted by the Board of Estimate on January 25, 1968.

Ruth W. Whaley

Secretary.

BOARD OF ESTIMATE
CITY OF NEW YORK

(Cal. No. 34)

Resolved, By the Board of Estimate, that the Rules of Procedure for the Conduct of the Business of the Board adopted on January 25, 1968 (Cal. No. 18), and subsequently amended, are further amended by amending Rule 37 to read as follows:

37. The Secretary shall cause the proceedings of each meeting of the Board to be printed by THE CITY RECORD pursuant to Board rules, and shall thereafter cause the same to be bound in volumes of a convenient size, with an index thereto. Copies thereof shall be furnished to the members of the Board.

A true copy of resolution adopted by the Board of Estimate on **FEBRUARY 11, 1971.**

Ruth W. Whaley

Secretary

Supplemental Affidavit of Professor Heywood T. Sanders, Read in Support of Plaintiffs' Motion for Summary Judgment, dated April 7, 1982

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81 Civ. 3920 (E.R.N.)

BEVERLY MORRIS; JOY CLARKE HOLMES; JOANNE OPLUSTIL,

Plaintiffs,

—against—

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of New York, CAROL BELLAMY, individually and as City Council President, HARRISON J. GOLDIN, individually and as Comptroller for the City of New York, HOWARD GOLDEN, ANDREW STEIN, STANLEY SIMON, DONALD MANES, ANTHONY GAETA, each individually and as Borough Presidents of the boroughs of the City of New York,

Defendants,

FRANK V. PONTERIO,

Applicant for Intervention.

Richard Emery
Arthur Eisenberg
New York Civil Liberties Union
84 Fifth Avenue
New York, NY 10011
(212) 924-7800

Counsel for Plaintiffs

Supplemental Affidavit of Professor Heywood T. Sanders

I, HEYWOOD T. SANDERS, DO HEREBY SWEAR AND DEPOSE THAT

1. I hold the Ph.D. in political science from Harvard University, and have taught urban politics and government at the University of Illinois for the past six years. I have conducted research on the organization and functions of urban government, and have authored articles on the subject, most recently for the 1982 *Municipal Yearbook*. I am currently a guest scholar at the Brookings Institution, Washington, D.C.

2. I have examined the report by Werner Kramarsky on the powers and functions of the Board of Estimate, as well as other historical materials on the Board's evolution and activities.

3. The New York City Board of Estimate has had a long and complex history. Under the Tweed charter of 1870, it functioned as a device for centralizing machine control of the city and ensuring its political dominance. The Board of Estimate and Apportionment created by the 1873 Charter was specifically designed as a fiscal watchdog to prevent the misuse of budgetary and bond issuance powers rampant under Tweed. As Griffith notes, "it was kept in later charters as it was found to have possibilities in the way of fixing responsibility not heretofore realized under the old methods." [Ernest S. Griffith, *The Modern Development of City Government*, 1927] The consolidation of greater New York in 1898 further enlarged the political as well as legal functions of the Board, by providing a forum for the borough presidents on larger policy issues. By 1926, Thomas Reed could note that "the real municipal legislature is not the Board of Alderman, but the Board of Estimate and Apportionment" and that "(t)he real im-

portance of the borough, however, is as a representative district." [Thomas Reed, *Municipal Government in the United States,* 1926]

The continuous historical existence has resulted in the Board's absorbtion of a variety of powers and authorities which might well have been placed in a different or newly created body. Cases in point are the 1905 shift of control over franchises to the Board, and the assumption of power over street improvements and assessments in 1911. The trend of the early 1900s was to shift such authority from independent boards or commissions often created under state law during the latter part of the 19th century to a more general city body, the council or commission.

The complex history of the Board of Estimate has resulted in a contemporary body which exercises a variety of authorities. In its power to grant leases on city property, transfer control of property among agencies, and designate land for specific purposes such as markets and recreation, the Board clearly resembles the general legislative body in other communities. In some narrow cases, such as authority over wharves or parks, other cities vest power in limited purpose boards or commissions, or special purpose public authorities.

The Board's responsibility for public improvements, sidewalk paving and the like grows out of the 19th century Board of Street Opening and Improvements. While such entities were not uncommon in the 19th century, they generally fell victim to a desire for a smaller, more responsible, local government with greater executive powers. Cities today vest authority for such public improvement in the city council. For example, the Cleveland City Council must specifically name by resolution those streets where sidewalks are to be repaired or improved.

The disposition of city-owned or acquired real property commonly is a function of the local city council. The responsibility for approving plans for urban renewal projects which the Board of Estimate exercises has been fixed in other locales by state law. Prior to 1974, these powers were generally granted to *either* the city council or to an independent board or public authority. The passage of the Housing and Community Development Act of 1974 altered the arrangements for federal assistance such that urban renewal authority is vested in general purpose city government, and exercised by local legislative bodies.

The Board of Estimate's responsibilities for planning functions, including changes in the city map, zoning, and subdivision planning do not follow the national practice. Such activities have generally been located in independent boards, while allowing for the possibility of some final review by the general city legislative body. Other elements of the Board's authority, such as its control over space under and above public streets, more clearly follow traditional legislative powers.

Authority for letting and regulating public contracts varies considerably across cities. In many cities in the east and midwest, this authority is vested in a committee of executive officials, generally including the mayor, city comptroller, city attorney, and other departmental officials. Many of these bodies were modelled on the New York City Board of Estimate and were intended to serve as financial watchdogs. The practice in new cities, particularly those with the city manager plan, has been to allow the manager full authority for contracts, subject to oversight by the legislative body. It is thus impossible to define a clear cut distinction between legislative and executive power in such matters. The Board's responsibility for the granting

of franchises is common to the legislative bodies of almost all other cities, and historically has been seen as a legislative function.

The Board of Estimate's role in the budget-making process is clearly a legislative one. Responsibility for fixing and altering items in both capital and operating budgets is invariably fixed in the city council or commission in American cities. A sharing of responsibility for the capital budget with the local planning commission was also a common part of local government procedure, although as practice has become less common with the reduction in the incidence of independent planning commissions.

New York City's Board of Estimate has no precise analogue in other cities, as it constitutes the last example of a "bicameral" local legislature. Nonetheless, it is evident that the Board exercises what are largely legislative functions in other communities. These functions are typical of general purpose local governments in the United States.

/s/ Heywood T. Sanders
Heywood Sanders

Subscribed and Sworn to before me this 7th day of April, 1982.

/s/ Madeline J. Kramer
Notary Public
My Commission Expires September 30, 1983

AFFIDAVIT OF SERVICE

UNITED STATES DISTRICT COURT
Eastern District of New York
81-CV-3920

Beverly Morris, et al.,
Plaintiffs,

—v—

The Board of Estimate, et al.,
Defendants.

State of New York,
County of New York, ss.:

I, Kathleen Durkin, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 84 Fifth Ave., NY NY 10011. On April 8, 1982 deponent served two copies of the within Professor Heywood T. Sanders' Supplementary Affidavit in Support of Plaintiffs' Motion for Summary Judgment upon Judy Levitt, Corporation Counsel and Counsel for Defendants in this action, at 100 Church St., NY NY the address designated by said attorney for that purpose, and one copy upon Frank V. Ponterio, pro se, at 766 Pelton Ave., S.I., NY, the address designated by said property, by depositing true copies of same enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me this
8th day of April, 1982.

/s/ Kathleen Durkin
Kathleen Durkin

/s/ Robert Levy
Notary Public

Affidavit of Frank V. Ponterio, Read in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Intervenor-Defendant's Motion to Strike Affidavits Submitted by Plaintiffs, filed April 30, 1982

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81-CV-3920 (E.R.N.)

BEVERLY MORRIS, JOY CLARKE HOLMES, JOANNE OPLUSTIL,

Plaintiffs,

—against—

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of New York, CAROL BELLAMY, individually and as City Council President, HARRISON J. GOLDIN, individually and as Comptroller for the City of New York, HOWARD GOLDEN, ANDREW STEIN, STANLEY SIMON, DONALD MANES, ANTHONY GEATA, each individually and as Borough Presidents of the Boroughs of the City of New York,

Defendants,

FRANK V. PONTERIO,

Intervenor-Defendant.

FRANK V. PONTERIO, pro se
Intervenor-Defendant
766 Pelton Avenue
Staten Island, New York 10310
(212) 981-7953

Affidavit of Frank V. Ponterio in Opposition to Motion

State of New York,
County of Richmond, ss.:

FRANK V. PONTERIO, an attorney duly licensed to practice law in the State of New York, being duly sworn, deposes and says:

1. I am a resident and a registered and qualified voter of the Borough of Staten Island, City and State of New York, County of Richmond.

2. I hold the Bachelor of Electrical Engineering and Master of Science degrees from the Polytechnic Institute of Brooklyn (now of New York), awarded in 1952 and 1964 respectively.

3. I am a licensed professional engineer in New York (since 1965) and am currently a director of the Richmond County Chapter, New York State Society of Professional Engineers.

4. I have been employed as an engineer and analyst by the Sperry Corporation for over 27 years. For the past 20 years I have been engaged in performing complex mathematical analyses in a variety of scientific disciplines.

5. This affidavit and accompanying memorandum of law are submitted in opposition to plaintiffs' motion for summary judgment and in support of my motion to strike the affidavits of Werner Kramarsky and Heywood T. Sanders, submitted by Plaintiffs.

6. Summary judgment is not appropriate in this action, even if the Court finds that the one person, one vote principle of the 14th Amendment of the United States Constitution applies to the New York City

Board of Estimate, because extensive factual and expert opinion would be required to determine how such principle should be applied to so complex and unique a body as the Board of Estimate.

7. The simple mathematical analyses and tests used by the Courts in the 18 years since the *Reynolds* v. *Sims* decision and relied upon by plaintiffs are wholly inapplicable to overlapping single and multi-member representation of political subdivisions and lead to clearly erroneous and unconstitutional results.

8. The analysis propounded by plaintiffs purporting to apply the one person, one vote principle is clearly erroneous in that it would grant to the Borough President of Brooklyn a weighted vote (1.58 votes) equal to 79% of the weighted vote (2 votes) of one of the city-wide members, viz., the Mayor, Comptroller, City Council President, even though such Borough President represent only 31.55% of the people represented by each city-wide member (i.e., the Brooklyn Borough President represents 2,230,936 people, and each city-wide member represents 7,071,030 people). Plaintiffs' erroneous application of its own argument underscores the inappropriateness of summary judgment in this action.

9. I oppose the application of the one person, one vote principle to the Board of Estimate and the use of equivalent "districts" to devise alleged equal representation proportional to "district" populations by weighted voting schemes. However, if the court holds that such principle applies and that weighted

votes based on equivalent "district" populations are required, any such plan must be based on allocation of votes such that the sum of the five (5) Borough Presidents' votes equal the vote of one city-wide member (2 votes) and all city-wide members must have the same vote.

10. Aside from being otherwise erroneous, plaintiffs' weighted voting scheme would give to Brooklyn a power to control outcomes of votes of the Board of Estimate far in excess of its deserved power based on its population. Exhibit I presents analysis of every theoretically-possible vote outcome of an 8-member Board of Estimate. That analysis demonstrates, among other things that, in every case where borough votes would be of any importance at all in achieving a majority, Brooklyn, acting alone, holds an absolute veto power, (i.e., where only one city-wide member votes in favor) or is decisive (i.e., where two city-wide members vote in favor). To the extent that Brooklyn would wield such undeserved power, all 4 other boroughs, especially Staten Island, would be disenfranchised.

11. That power to affect voting outcomes must be considered in any voting scheme for the Board of Estimate is even more graphically shown in Exhibit I which applies plaintiffs' weighted voting to the five (5) boroughs based upon the 1970 census population figures. In that case, Staten Island's vote would never have counted. Its vote would never be needed to achieve a majority, and, if withheld, could never deny a majority. Under those circumstances Staten Island would not, even by plaintiffs' argu-

ment, enjoy a percent representation proportional to its population but would be totally disenfranchised. This analysis demonstrates that simple-minded voting schemes are not appropriate for complex situations and in fact can create a greater evil than they are intended to correct.

12. The affidavit and exhibits of Werner Kramarsky are incompetent, irrelevant, and immaterial and should be stricken by the court. Mr. Kramarsky's alleged personal knowledge applies to a period of time 12 to 15 years ago by his own admission and his affidavit does not even allege that such knowledge is applicable to the present. His affidavit is replete with unsupported conclusory statements and barren of relevant and material facts. His study of the Board of Estimate, Exhibit A, recounts a history of the Board and comments on theoretical and hypothetical questions relating to the functions and powers of the Board, all of which is irrelevant and immaterial in this action. The analysis of Board calendars relates to the year 1971 with no indication of relevance to the present and reflects a voting scheme in which there were a total of 22 votes whereas the Board currently has a total of 11 votes. Appendix B of Exhibit A is a copy of the Board's Rules of Procedure but it too is out of date, not reflecting changes made in 1975, 1978, and 1980. Furthermore, Mr. Kramarsky's affidavit is self-contradictory. Although offered in support of plaintiffs' argument that the Board exercises such powers and is of such a nature as to be required to conform to the one person, one vote principle, Mr. Kramarsky

states "Obviously, the great majority of issues before the Board are of negligible interest to the general public . . .", Kramarsky affidavit, Appendix A at 20, and "The relatively low turnout for public hearings is primarily due to the nature of the Board's business. The majority of decisions which the Board makes deal with matters of governmental rather than public controversy", *Id.* at 24, 25. Mr. Kramarsky's affidavit is also offered in support of plaintiffs' proposed weighting scheme which plaintiffs allege provides a constitutionally acceptable representation to the five (5) boroughs based upon their respective populations. However, Mr. Kramarsky himself emphatically denies this by stating "In any case, keeping control of the Board with its city-wide members and reapportioning the Borough Presidents' votes according to population would reduce the Borough President of Staten Island to the status of an observer in the Board's deliberations", *Id.* at 116, 117. Mr. Kramarsky testifies in this action as the New York State Commissioner of Human Rights as set forth in paragraph 1 of his affidavit. As such his testimony is incompetent in that it is beyond the scope of his authority as Commissioner to testify as to the nature of municipal governments.

13. The affidavit of Heywood T. Sanders is incompetent, irrelevant, and immaterial, and should be stricken by the court. Professor Sanders' affidavit is nothing more than an academician's musing and is devoid of facts. Furthermore, Professor Sanders neither demonstrates nor even alleges any personal knowledge

Affidavit of Frank V. Ponterio in Opposition to Motion

of the New York City Board of Estimate and avers only that he has read the Kramarsky report and other historical materials. This hardly qualifies Professor Sanders either as a lay witness with personal knowledge or an expert witness qualified to testify specifically on the Board of Estimate as it exists and functions today.

/s/ Frank V. Ponterio
Frank V. Ponterio

Subscribed and sworn to
before me this
day of April 1982

Notice of Cross Motion for Summary Judgment, dated May 24, 1982

UNITED STATES DISTRICT COURT

Eastern District of New York

81 Civ. 3920 (ERN)

Beverly Morris; Joy Clarke Holmes; Joannf Oplustil,

Plaintiffs,

—against—

The Board of Estimate, The City of New York, Edward I. Koch, individually and as Mayor of New York, Carol Bellamy, individually and as City Council President, Harrison J. Goldin, individually and as Comptroller for the City of New York, Howard Golden, Andrew Stein, Stanley Simon, Donald Manes, Anthony Geata, each individually and as Borough Presidents of the Boroughs of the City of New York,

Defendants,

Frank V. Ponterio,

Intervenor-Defendant.

To All Counsel:

Please Take Notice that, upon the annexed counter-statement of facts pursuant to Local Rule 3(g) dated May 24, 1982, the accompanying Memorandum of Law and upon all the prior papers and proceedings heretofore had herein, defendants will cross-move this Court before the Honorable Edward R. Neaher, United States District Judge, at the

Notice of Cross-Motion for Summary Judgment

United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York on the 11th day of June, 1982, at 10:30 A.M., or as soon thereafter as counsel may be heard, for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting defendants summary judgment on the grounds that there is no genuine issue as to any material fact as set forth in the complaint, and that defendants are entitled to summary judgment as a matter of law, and for such other and further relief as this Court may deem just and proper.

Dated: New York, New York
May 24, 1982

FREDERICK A. O. SCHWARZ, JR.
Corporation Counsel of the
City of New York
Attorney for Defendants
100 Church Street
New York, N.Y. 10007
By: /s/ JUDITH A. LEVITT
Judith A. Levitt
Assistant Corporation Counsel

Defendants' Counter-Statement of Facts Pursuant to Rule 3(g), dated May 28, 1982

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81 Civ. 3920 (ERN)

BEVERLY MORRIS; JOY CLARKE HOLMES; JOANNE OPLUSTIL,

Plaintiffs,

—against—

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of New York, CAROL BELLAMY, individually and as City Council President, HARRISON J. GOLDIN, individually and as Comptroller for the City of New York, HOWARD GOLDEN, ANDREW STEIN, STANLEY SIMON, DONALD MANES, ANTHONY GEATA, each individually and as Borough Presidents of the Boroughs of the City of New York,

Defendants,

—and—

FRANK V. PONTERIO,

Intervenor-Defendant.

Defendants submit the following statement of facts in support of their cross-motion for summary judgment. Defendants contend that there are no material facts as to which there exists a genuine issue to be tried with respect to the complaint, and that the following undisputed facts establish that defendants are entitled to summary judgment in their favor as a matter of law.

Defendant's Counter-Statement of Facts Pursuant to Rule 3(g), dated May 28, 1982

1. Defendants do not controvert the statement of fact contained in paragraphs "1" through "8" and "10" through "15."

2. The New York Court of Appeals in *Bergerman* v. *Lindsay*, 25 N.Y. 2d 405 (1969), *appeal dismissed and cert. denied*, 389 U.S. 955 (1970) held the one person, one vote principle inapplicable to the New York City Board of Estimate.

3. The Court of Appeals in *Bergerman* concluded that the New York City Board of Estimate was not the duly elected legislative body of the City of New York and that it did not exercise general governmental powers.

Dated: New York, New York
May 24, 1982

Respectfully submitted,

FREDERICK A. O. SCHWARZ, JR.
Corporation Counsel of the
City of New York
Attorney for Defendants
100 Church Street
New York, N.Y. 10007
(212) 566-2091/2139
By: /s/ JUDITH A. LEVITT
Judith A. Levitt
Assistant Corporation Counsel

Plaintiffs' Answer to Defendants' First Set of Interrogatories, dated May 28, 1982

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81 Civ. 3920 (E.R.N.)

BEVERLY MORRIS; JOY CLARKE HOLMES;
JOANNE OPLUSTIL,

Plaintiffs,

—v—

THE BOARD OF ESTIMATE, et al.,

Defendants.

---

1. Are there any available alternative methods of preserving borough representation on the defendant Board of Estimate which plaintiffs believe would give them an equal representative share on the Board of Estimate?
Yes.

2. If so, specifically describe each alternative plan contemplated by plaintiffs, including for each plan the proposed number of votes and the proposed weight of the votes of the members of the Board of Estimate.

a) the Mayor of the City of New York,

b) the Comptroller of the City of New York,

c) the President of the New York City Council,

d) the Borough President of Manhattan,

e) the Borough President of the Bronx,

f) the Borough President of the Bronx,

g) the Borough President of Queens,

h) the Borough President of Staten Island.

Plans with fractional votes are unacceptable from plaintiffs' point of view. An acceptable plan to preserve enough representation would add representatives to the Board of Estimate from Brooklyn, Queens, Manhattan and the Bronx in proportion to the population of Staten Island which would maintain its one vote on the Board. The three city-wide officeholder members would have their votes increased to provide them with the bare majority they now control. The votes would be as follows:

Brooklyn— 6 representatives, one of whom is Borough President

Queens— 5 representatives, one of whom is Borough President

Manhattan— 4 representatives, one of whom is Borough President

The Bronx— 3 representatives, one of whom is Borough President

Staten Island—1 representative, the Borough President

Mayor—7 votes

Comptroller—7 votes

Council President—7 votes

21 Citywide votes

Total 40 votes

Norm population per Board of Estimate vote

$$\frac{7{,}071{,}030}{40 \text{ votes}} = 176{,}775$$

	City Wide Votes	*Borough Vote Total*
Brooklyn	6.63	6 = 12.63
Queens	5.62	5 = 10.62
Manhattan	4.24	4 = 8.24
Bronx	3.47	3 = 6.47
Staten Island	1.06	1 = 2.06

Population per Board of Estimate vote, by borough

Brooklyn	176,637.8
Queens	178,090.0
Manhattan	173,244.2
Bronx	180,697.8
Staten Island	170,932.5

Deviations from norm population per Board of Estimate vote 176,775.0

Brooklyn	.00%
Queens	— .74%
Manhattan	+ 1.99%
Bronx	— 2.22%
Staten Island	+ 3.31%
Total Deviation	± 5.53%

Richard Emery
New York Civil Liberties Union
84 Fifth Avenue
New York, NY 10011
(212) 924-7800
Attorney for Plaintiffs

Dated: May 28, 1982
New York, New York

Affidavit of Frank V. Ponterio, Read in Support of Motion to Deem Issues Resolved, dated September 30, 1983

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
81-CV-3920 (E.R.N.)

BEVERLLY MORRIS, JOY CLARKE HOLMES, JOANNE OPLUSTIL,

Plaintiffs,

—against—

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of New York, CAROL BELLAMY, individually and as City Council President, HARRISON J. GOLDIN, individually and as Comptroller for the City of New York, HOWARD GOLDEN, ANDREW STEIN, STANLEY SIMON, DONALD MANES, ANTHONY GAETA, each individually and as Borough Presidents of the Boroughs of the City of New York,

Defendants,

FRANK V. PONTERIO and ROBERT STRANIERE,

Intervenor-Defendants.

Dated: September 30, 1983

FRANK V. PONTERIO, pro se
Intervenor-Defendant
766 Pelton Avenue
Staten Island, New York 10310
(212) 981-7953

Affidavit of Frank V. Ponterio in Support of Motion

State of New York
County of Richmond ss.:

FRANK V. PONTERIO, an attorney duly licensed to practice law in the State of New York, being duly sworn, deposes and says:

1. I am a resident and a registered and qualified voter of the Borough of Staten Island, City and State of New York, County of Richmond.

2. I hold the Bachelor of Electrical Engineering and Master of Science degrees from the Polytechnic Institute of Brooklyn (now of New York), awarded in 1952 and 1964 respectively.

3. I am a licensed professional engineer in New York (since 1965) and I am a member and former director of the Richmond County Chapter, New York State Society of Professional Engineers.

4. I have been employed as an engineer and mathematical analyst by the Sperry Corporation for 29 years. For the past 22 years I have been engaged in performing complex mathematical analyses in a variety of scientific disciplines.

5. This affidavit and accompanying memorandum of law are submitted in support of my motion to deem issues resolved.

6. The Board of Estimate ("Board") is unlike any other governmental body subjected to scrutiny by the Courts in apportionment cases with regard to its composition, history, functions, and voting rules. As a consequence, the

simple mathematical tests used by the Courts since the *Reynolds** decision in 1964 and, in particular, the *Abate*** test proffered upon initial proceedings in this Court and upon appeal by plaintiffs, are inappropriate in this case and, if applied, would subvert rather than uphold Equal Protection principles.

7. Upon appeal of the decision of this Court that the Board was not subject to one person, one vote principles, plaintiffs-appellants asked the U.S. Court of Appeals for the Second Circuit to direct entry of summary judgment based upon a reiteration of plaintiffs' strained application of the *Abate* test to the Board which purported to show a facially unconstitutional malapportionment. The Second Circuit rejected plaintiffs' plea and directed this Court to:

a) Devise an appropriate methodology for analyzing apportionment on the Board.

b) Employ such methodology to measure the degree of malapportionment of the Board and

c) Rule on the policies and interests which the Supreme Court has held may justify deviations from the literal one person, one vote formula.

8. The key flaws in the *Abate* percent deviation methodology are its inability to treat the Board's overlay of city-wide and borough votes or to account for the interplay of this overlay and the Board's specific voting rules. Plaintiffs attempted to adapt the *Abate* methodology to the Board by apportioning the 6 city-wide votes among the

* *Reynolds* v. *Sims*, 377 U.S. 533 (1964).

** *Abate* v. *Mundt*, 403 U.S. 182 (1971).

boroughs in linear proportion to borough populations. There is no factual basis for making such an apportionment. Moreover, such an approach obscures the fact that, when a city-wide member votes, *all* of the people of the City are represented.

9. A compelling case for rejecting application of the *Abate* methodology to the Board, even as adapted by plaintiffs, is made out by several examples. It is revealing to examine the practical effect of the distribution of votes among the five towns scrutinized in *Abate* after the Court "cured" malapportionment found in *Lodico* v. *Board of Supervisors*, 256 F. Supp. 440 (S.D.N.Y. 1966). For simple majority votes, where each town either votes "Yes" or doesn't vote "Yes" (i.e., a "No" vote, an abstention, or not present), there are thirty-two possible vote outcomes. All are shown in Table I. Also indicated are those cases in which a majority is achieved (15 cases) and whether, in those cases, a town's vote is decisive (a decisive vote is one which, if deleted, would cause the total vote to fall below a majority). Obviously, a vote which is not decisive plays no part in achieving or denying a majority and is therefore no vote at all. Table II shows that, in terms of vote outcomes, the larger towns have a power greatly in excess of their proportion of total population. In particular, Orangetown with a population only about twice that of Haverstraw has a power to determine outcomes seven times that of Haverstraw. Clearly indicated is theoretical conclusion arrived at by Banzhaf* that equal *per capita* representation applied to districts of widely disparate populations leads to over-representation of the larger dis-

* Banzhaf, John F., "Multi-Member Electoral Districts—Do They Violate the 'One Man, One Vote' Principle", 75 Yale L.J. 1309.

TABLE I

	Stony Point	Haver straw	Orange town	Clark town	Ramapo	Majority Achieved	Decisive Votes: Stony Point	Haver straw	Orange town	Clark town	Ramapo
votes	1	2	4	5	6						
1											
2					Y						
3				Y							
4				Y	Y	Y				Y	Y
5			Y								
6			Y		Y	Y			Y		Y
7			Y	Y							
8			Y	Y	Y	Y				Y	Y
9		Y									
10		Y			Y						
11	Y		Y								
12		Y		Y	Y	Y				Y	Y
13		Y	Y								
14		Y	Y		Y	Y			Y		Y
15		Y	Y	Y		Y		Y	Y	Y	
16		Y	Y	Y	Y	Y					
17	Y										
18	Y				Y						
19	Y			Y							
20	Y			Y	Y	Y				Y	Y
21	Y		Y								
22	Y		Y		Y	Y			Y		Y
23	Y		Y	Y		Y	Y		Y	Y	
24	Y		Y	Y	Y	Y					
25	Y	Y									
26	Y	Y			Y						
27	Y	Y		Y							
28	Y	Y		Y	Y	Y				Y	Y
29	Y	Y	Y								
30	Y	Y	Y		Y	Y			Y		Y
31	Y	Y	Y	Y		Y			Y	Y	
32	Y	Y	Y	Y	Y	Y					
				Totals		15	1	1	7	8	9
				% of cases in which vote is decisive			6.67	6.67	46.67	53.33	60.00
				% of total population			5.54	10.82	23.80	26.45	33.39

Note: Y indicates Yes

TABLE II

	Stony Point	Haver straw	Orange town	Clark town	Ramapo	Majority Achieved	Decisive Votes: Stony Point	Haver straw	Orange town	Clark town	Ramapo
votes	.997	1.948	4.284	4.762	6.009						
1											
2					Y						
3				Y							
4				Y	Y	Y					
5			Y							Y	Y
6			Y		Y	Y					
7			Y	Y					Y		Y
8			Y	Y	Y	Y					
9		Y									Y
10		Y			Y						
11	Y		Y								
12		Y		Y	Y	Y					
13		Y	Y							Y	Y
14		Y	Y		Y	Y					
15		Y	Y	Y		Y			Y		Y
									Y	Y	
16		Y	Y	Y	Y	Y					
17	Y										
18	Y				Y						
19	Y			Y							
20	Y			Y	Y	Y				Y	Y
21	Y		Y								
22	Y		Y		Y	Y			Y		Y
23	Y		Y	Y		Y			Y	Y	
24	Y		Y	Y	Y	Y					
25	Y	Y									
26	Y	Y			Y						
27	Y	Y		Y							
28	Y	Y		Y	Y	Y					Y
29	Y	Y	Y								
30	Y	Y	Y		Y	Y					Y
31	Y	Y	Y	Y		Y			Y	Y	
32	Y	Y	Y	Y	Y	Y					
					Totals	15	0	0	6	6	9
					% of cases in which vote is decisive		0	0	40.0	40.0	60.00
					% of total population		5.54	10.82	23.80	26.45	33.39

Note: Y indicates Yes

tricts. It is even more enlightening to see what would have happened if the court in *Lodico* had "cured" the malapportioned perfectly, i.e., even if the marginally acceptable 11.9% deviation were eliminated by redistributing votes *exactly* proportional to population. Such a case is shown in Table II, again for all possible vote outcomes. Now, the one opportunity each for Stony Point and Haverstraw to affect a vote outcome has been eliminated. Both towns would be *completely disenfranchised.* For their residents, the principle applicable is one person, no vote. Significantly, the dubious acceptability of *Abate* as actually implemented is solely a function of the arbitrary *imprecision* in allocating votes among the towns.

The self-contradictory feature of the *Abate* test can be shown by the following examples. Table III shows an *Abate* analysis for the indicated hypothetical populations of the boroughs and for a Board in which the complicating feature of city-wide votes is absent. Staten Island is "over-represented" by 70%. Nevertheless, for a simple majority (11 out of 21 votes) no combination of votes relies upon Staten Island's one vote. Therefore, Staten Island has no vote. Quaere, is this scheme unconstitutional because Staten Island has excessive representation, or because Staten Island has no representation at all?

TABLE III

Borough	Population	Votes	Norm District Population	Actual District Population	% Deviation
Brooklyn	2,900,000	8	333,333	362,500	— 8.75
Queens	2,000,000	6	333,333	333,333	0
Manhattan	1,000,000	3	333,333	333,333	0
Bronx	1,000,000	3	333,333	333,333	0
Staten Is.	100,000	1	333,333	100,000	+70.
Totals:	7,000,000	21			78.75

The weakness of the *Abate* test which can lead to such sinister results is its preoccupation with percents instead of persons and its complete disregard of the consequences of its use.*

10. Plaintiffs have suggested a recomposed Board in which there would be 19 borough members and the current city-wide members. The 19 borough members, each having one vote, would be apportioned 6 to Brooklyn, 5 to Queens, 4 to Manhattan, 3 to the Bronx, and 1 to Staten Island. In each case, one such member would be the borough president. To maintain approximately the same ratio of city-wide to borough voting power (6:5) plaintiffs' scheme would allocate 7 votes to each city-wide member. Accordingly, there would be a total of 40 votes, 21 city-wide, 19 borough. Plaintiffs' plan purports to conform almost exactly with one person, one vote requirements by allocating borough votes approximately in linear proportion to borough populations. Exhibits I and II show every voting combination respectively for the full Board and the mayorless Board, assuming bloc borough voting. Plaintiffs' selection of 7 votes for each city-wide member does not preserve the current ratio of city-wide to borough votes as well as a choice of 8 votes per city-wide member would. The current ratio is 6:5 or 1.2. Plaintiffs' choice yields a ratio of 21:19 or 1.105. Substitution of 8 votes per city-wide member yields a ratio of 24:19 or 1.263; a closer match, albeit not far different. If anything logic dictates that a larger ratio of city-wide to borough votes would tend to decrease

* An extreme example illustrates the point. If one voter in the U. S. were given 2 votes instead of 1, the result would be inconsequential, but the % deviation is 100%. If one-half of all voters in the U. S. were given 2 votes instead of 1, the result would be significant, but the % deviation is less, viz., 67%.

the relative voting power of the borough members vis-a-vis the city-wide members. The comparable voting combinations are shown in Exhibits III and IV. The mischief that can be worked by *Abate* thinking can be seen by comparing the totals at the foot of each of Exhibits I and III and Exhibits II and IV. Contrary to logical expectations, giving a higher proportion of votes to the city-wide members greatly *increases* the voting power of Brooklyn. For simple majorities, with 7 votes per city-wide member, Brooklyn's vote is decisive in 48 out of a total of 122 cases in which a simple majority is achieved. Again, as in *Abate* itself, a salient characteristic of an apportionment plan founded upon *Abate* thinking is solely the product of an arbitrary choice of the imprecision of the plan.

11. There is no technique known to mathematics or black magic which can be applied to a representative situation as complex as the Board's and lead to conclusions which are unequivocal. There is no one method for analyzing the Board's compliance with one person, one vote principles, because the common definition of such principles falls apart when applied to unique bodies like the Board. I have developed an analysis which both recognizes the Board's overlay of city-wide and borough votes and examines every voting rule under which the Board functions.

Both my proposed analysis and the plaintiffs' attempts to adapt the percent deviation test can best be understood by recognizing that the Board can be analogized to a floterial "district". A floterial district is a super-district consisting of two or more sub-districts. Each sub-district may have its own representatives, and the super-district itself has one or more representatives, essentially at-large representatives of all of the sub-districts. Floterial districts have been used in state legislative apportionment plans to

achieve equality of representation in situations where it is desired to equalize representation without altering existing boundaries of political sub-divisions. For example, suppose a legislature consists of 100 districts of various sizes and in 97 of these districts it is possible to allocate an integral number of legislators with acceptably small deviations of their population-per-legislator ratios from the norm. To be specific, let us assume a norm of 10,000. Further assume that each of the remaining 3 districts has a population of 14,000 and is allotted 1 legislator. In effect, each district is short four-tenths of a legislator. If left as individual districts, Districts A, B, and C would have relatively large deviations from the norm (40%).

Since the aggregate deficiency of legislators for Districts A, B, and C is about 1 legislator, the deviations can be reduced by creating a floterial district consisting of Districts A, B, and C, and allocating 1 legislator, at-large, to the floterial or super-district. The deviation is thereby reduced to 4.0%.

The Board may be looked upon as a single floterial district, the super-district being the City and the sub-districts the five boroughs. Each Borough President is a sub-district representative and the city-wide members are the super-district representatives.

Two methods have been used in apportionment cases to examine departures from ideal representation in floterial districts. The methods, which can yield significantly different results, are the "aggregate" method and the "shared" method. Plaintiffs' adaptation of the *Abate* test is little more than the shared method of analyzing floterial districts. In the shared method, the votes of the super-district representatives are shared among the sub-districts in proportion to the sub-district populations. Each sub-dis-

trict is considered to be represented by the total of its district representatives and its shares of the super-district representatives. Plaintiffs have performed such an analysis by 1) apportioning the six votes of the three city-wide members among the boroughs, 2) adding one vote per borough to account for its President's vote, then 3) examining the percent deviation of the population per vote for each borough against the overall City norm population per vote. As described *infra*, my analysis uses an adaptation of the aggregate method of analyzing floterial districts. In the aggregate method, there is no attempt to divide super-district representation among the sub-districts, proportionately or otherwise. The method avoids altogether the necessity for making unsubstantiatable assumptions about how such representatives divide themselves. Only an overall population-per-vote ratio is defined, viz., the total super-district population divided by the sum of sub-district and super-district votes. In a typical state legislative plan, this ratio is compared with similar ratios for other floterial districts as well as for single-member districts, and percent deviations calculated.

In order to adapt the aggregate method of analysis to the Board considered as a single floterial district, it is necesssary to make some accommodations. I begin by defining an ideal or norm, namely, a hypothetical Board of the same structure as the actual Board but one which all of the five boroughs have identical populations (i.e. 7, 071, $030 \div 5 = 1{,}414{,}206$). Clearly, if the five boroughs had identical populations and identical representation, every test would find it constitutionally perfect. Ordinarily, the quantity whose deviation is measured is a population-per-vote ratio. However, since the aggregate ratios for the actual and ideal Board are identical, a different measure

must be defined. The measure selected is an effective population represented in all combinations of the city-wide and borough votes, denoted as "weighted votes". Each city-wide member's vote is weighted by the population he represents (and from which he is elected) viz., the total city population of 7,071,030. Each Borough President's vote is weighted by his borough's population. In this way, the multiple representation of the city-wide members and the overlay of city-wide and borough representation are accommodated, i.e., if two city-wide members cast a "yes" vote, the entire city population is represented twice. If the Brooklyn Borough President joins in this vote, Brooklynites are represented three times, twice by the city-wide members and once by their Borough President. No assumptions need be made about how city-wide members divide their loyalties among the boroughs. Furthermore, unlike plaintiffs' initial analysis, this methodology focuses on representation of people, not voting power to boroughs. The current "votes" of Board members, 2 for each city-wide member and 1 for each borough member are interpreted as simply defining the coalitions of members which enable the Board to act.

Next, every coalition which allows the Board to act is defined and for each such coalition the population-weighted city-wide and borough votes are summed to find total weighted votes. These total weighted votes are then compared with the corresponding total weighted votes which would result for the same coalition on the ideal Board, and percent differences computed.

As presently constituted, the full Board can act by (at least) votes of the following members:

SIMPLE MAJORITY (6 VOTES)

Case I:	2 city-wide	+ 2 boroughs
Case II:	1 city-wide	+ 4 boroughs
Case III:	3-city-wide	+ no boroughs

TWO-THIRDS MAJORITY (8 VOTES)

Case IV:	2-city-wide	+ 4 boroughs
Case V:	3 city-wide	+ 2 boroughs

THREE-FOURTHS MAJORITY (9 VOTES)

Case VI:	2 city-wide	+ 5 boroughs
Case VII:	3 city-wide	+ 3 boroughs

UNANIMOUS (11 VOTES)

Case VIII:	3 city-wide	+ 5 boroughs

On budget override matters, the vote of the Mayor is not counted. Either a simple majority or a two-thirds majority may be required. These majorities can be achieved by (at least) votes of the following members:

SIMPLE MAJORITY (5 VOTES)

Case IX:	2 city-wide	+ 1 borough
Case X:	1 city-wide	+ 3 boroughs
Case XI:	no city-wide	+ 5 boroughs

TWO-THIRDS MAJORITY (6 VOTES)

Case XII:	2 city-wide	+ 2 boroughs
Case XIII:	1 city-wide	+ 4 boroughs

Exhibits V through VII show every combination of votes (cases) of the full Board for simple majority, two-thirds

majority, and three-fourths majority respectively. Also shown at the foot of each exhibit are averages of the percent differences for all cases, for all cases in which the associated majority is achieved, and for all threshold cases, i.e., cases in which the associated majority is just achieved. Exhibits VIII and IX show respectively corresponding information for votes of the mayorless Board for simple majority and two-thirds majority votes. Tables IV, V, VI, VII, and VIII present a summary of threshold cases from Exhibits V through IX. As can be readily seen, the percent differences from norm (a positive value indicates overrepresentation) vary significantly depending on the makeup of each combination, as should be expected. Obviously, percent differences for unanimous votes are zero. Absent any knowledge to the contrary, it is reasonable and fair to treat all combinations as equally likely and examine average percent differences as measures of vote apportionment. Table IX summarizes both average differences and maximum percent differences. Maximum percent differences for combinations which do not permit the Board to act are inconsequential and need not be considered.

It is apparent that when the actual representation of each city-wide and borough member is accounted for under the Board's voting structure, average and even maximum percent differences are not excessive. Furthermore, the very existence of two-thirds, three-fourths, and unanimous vote requirements ensures that Board actions are controlled by representatives of a majority of the city population.

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TABLE IV

SIMPLE MAJORITY—FULL BOARD

Case	Boroughs Voting Yes	Weighted Borough Votes	Weighted Total Votes	% Difference From Norm
I	Bn+Q	4122261	18264321	— 7.62
	Bn+M	3658469	17800529	— 4.89
	Bn+Bx	3400051	17542111	— 3.37
	Bn+S	2583057	16725117	+ 1.45
	Q+M	3318858	17460918	— 2.89
	Q+Bx	3060440	17202500	— 1.37
	Q+S	2243446	16385506	+ 3.45
	M+Bx	2596648	16738708	+ 1.37
	M+S	1779654	15921714	+ 6.18
	Bx+S	1521236	15663296	+ 7.70
II	Bn+Q+M+Bx	6718909	13789939	— 8.34
	Bn+Q+M+S	5901915	12972945	— 1.93
	Bn+Q+Bx+S	5643497	12714527	+ 0.10
	Bn+M+Bx+S	5179705	12250735	+ 3.75
	Q+M+Bx+S	4840094	11911124	+ 6.42
III	None	0000000	21213090	0.00

Bn–Brooklyn; Q–Queens; M–Manhattan; Bx–Bronx; S–Staten Island

Norm weighted total votes: Case I, 16970472
Case II, 12727854
Case III, 21213090

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TABLE V

TWO-THIRDS MAJORITY—FULL BOARD

Case	Boroughs Voting Yes	Weighted Borough Votes	Weighted Total Votes	% Difference From Norm
IV	Bn+Q+M+Bx	6718909	20860969	— 5.36
	Bn+Q+M+S	5901915	20043975	— 1.24
	Bn+Q+Bx+S	5643497	19785557	+ 0.07
	Bn+M+Bx+S	5179705	19321765	+ 2.41
	Q+M+Bx+S	4840094	18982154	+ 4.13
V	Bn+Q	4122261	25335351	— 5.38
	Bn+M	3658469	24871559	— 3.45
	Bn+Bx	3400051	24613141	— 2.38
	Bn+S	2583057	23796147	+ 1.02
	Q+M	3318858	24531948	— 2.04
	Q+Bx	3060440	24273530	— 0.97
	Q+S	2243446	23456536	+ 2.43
	M+Bx	2596648	23809738	+ 0.96
	M+S	1779654	22992744	+ 4.36
	Bx+S	1521236	22734326	+ 5.44

Bn–Brooklyn; Q–Queens; M–Manhattan; Bx–Bronx; S–Staten Island

Norm total weighted votes: Case IV, 19798884
Case V, 24041502

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TABLE VI

THREE-FOURTHS MAJORITY—FULL BOARD

Case	Boroughs Voting Yes	Weighted Borough Votes	Weighted Total Votes	% Difference From Norm
VI	Bn+Q+M+Bx +S	7071030	21213090	0.00
	Bn+Q+M	5549794	26762884	— 5.14
	Bn+Q+Bx	5291376	26504466	— 4.12
	Bn+Q+S	4474382	25687472	— 0.91
	Bn+M+Bx	4827584	26040674	— 2.30
VII	Bn+M+Bx	4010590	25223680	+ 0.91
	Bn+Bx+S	3752172	24965262	+ 1.93
	Q+M+Bx	4487973	25701063	— 0.96
	Q+M+S	3670979	24884069	+ 2.25
	Q+Bx+S	3412561	24625651	+ 3.26
	M+Bx+S	2948769	24161859	+ 5.08

Bn–Brooklyn; Q–Queens; M–Manhattan; Bx–Bronx; S–Staten Island

Norm weighted total votes: Case VI, 21213090
Case VII, 25455708

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TABLE VII

SIMPLE MAJORITY—MAYORLESS BOARD

Case	Boroughs Voting Yes	Weighted Borough Votes	Weighted Total Votes	% Difference From Norm
	Bn	2230936	16372996	— 5.25
	Q	1891325	16033385	— 3.07
IX	M	1427533	15569593	— 0.09
	Bx	1169115	15311175	+ 1.58
	S	352121	14494181	+ 6.83
	Bn+Q+M	5549794	12620824	— 11.55
	Bn+Q+Bx	5291376	12362406	— 9.27
	Bn+Q+S	4474382	11545412	— 2.05
	Bn+M+Bx	4827584	11898614	— 5.17
X	Bn+M+S	4010590	11081620	+ 2.05
	Bn+Bx+S	3752172	10823202	+ 4.33
	Q+M+Bx	4487973	11559003	— 2.17
	Q+M+S	3670979	10742009	+ 5.05
	Q+Bx+S	3412561	10483591	+ 7.34
	M+Bx+S	2948769	10019799	+ 11.44
XI	Bn+Q+M+Bx +S	7071030	7071030	0.00

Bn–Brooklyn; Q–Queens; M–Manhattan; Bx–Bronx; S–Staten Island

Norm weighted total votes: Case IX, 15556266
Case X, 11313648
Case XI, 7071030

TABLE VIII

TWO-THIRDS MAJORITY—MAYORLESS BOARD

Case	Boroughs Voting Yes	Weighted Borough Votes	Weighted Total Votes	% Difference From Norm
XII	Bn+Q	4122261	18264321	— 7.62
	Bn+M	3658469	17800520	— 4.89
	Bn+Bx	3400051	17542111	— 3.37
	Bn+S	2583057	16725117	+ 1.45
	Q+M	3318858	17460918	— 2.89
	Q+Bx	3060440	17202500	— 1.37
	Q+S	2243446	16385506	+ 3.45
	M+Bx	2596648	16738708	+ 1.37
	M+S	1779654	15921714	+ 6.18
	Bx+S	1521236	15663296	+ 7.70
XIII	Bn+Q+M+Bx	6718909	13780030	— 8.34
	Bn+Q+M+S	5901915	12972945	— 1.93
	Bn+Q+Bx+S	5643497	12714527	+ 0.10
	Bn+M+Bx+S	5179705	12250735	+ 3.75
	Q+M+Bx+S	4840094	11911124	+ 6.42

Bn–Brooklyn; Q–Queens; M–Manhattan; Bx–Bronx; S–Staten Island

Norm weighted total votes: Case XII, 16970472
Case XIII, 12727854

TABLE IX

	Majority Required	Average % Differences: Threshold Cases	Average % Differences: All Achieved Cases	Average % Differences: All Cases	Maximum % Differences (All Achieved Cases): Cases Represented	Maximum % Differences (All Achieved Cases): Under Represented
Full Board	1/2	3.97	3.20	6.15	+ 7.70	— 8.34
	2/3	2.72	2.38	6.15	+ 5.44	— 5.36
	3/4	2.07	1.93	6.15	+ 5.14	— 5.08
Mayorless Board	1/2	5.29	4.21	4.32	+11.44	—11.55
	2/3	4.07	3.47	4.31	6.42	— 8.34

12. A plan with a deviation greater than that characteristic of the current Board has already been declared to be not facially unconstitutional. In *Baker* v. *Regional High School District No. 5,* 476 F. Supp. 319 (1979), Judge Newman of the U.S. Court of Appeals for the Second Circuit, sitting by designation, upheld a plan for three Connecticut towns which purposefully diluted the voting power of the largest town. The Regional District was composed of the towns of Orange, Woodbridge, and Bethany with the following populations and votes:

Town	Population	Votes	Population per Vote
Orange	13,524	7 (6)	1932 (2254)
Woodbridge	7,673	4	1918
Bethany	3,857	2	1929
	25,054	13	

Norm = 25,054 ÷ 13 = 1927

Specifically to avoid domination of the District by the town of Orange which, with a number of votes linearly proportional to its population, had itself a majority of

total votes, a rule was adopted that required votes of representatives from more than one town to form a majority authorizing the District to act. Simply stated, this rule effectively limits the total vote of Orange to 6 instead of 7 votes. This essentially results in a diminution of Orange's representation by $\frac{7-6}{7}$ or 14.3%. An *Abate* analysis would show a percent deviation for Orange of $\frac{1927-2254}{1927}$ $\times$ 100 or 17%. In its own way, the current composition and voting rules of the Board attempt to achieve the same result as that in *Baker*, i.e., to balance literal one person, one vote constraints and the practical necessity to avoid domination by a single member (Brooklyn) of a body. Moreover it does so with a worst-case departure from such literal constraints smaller than that approved in Baker.

13. In its opinion on appeal, the Second Circuit advised that the opportunity of individual voters to elect the city-wide members of the Board should be considered. The following statistics indicate that Staten Island's opportunity to determine the outcome of city-wide elections is non-existent. Tables X through XV show the vote by county for mayor for all election years from 1961 through 1981 (source: Official Directory, the City of New York). In none of those years did the Staten Island vote affect the election outcome. The mayor's race was extraordinarily close in 1965 but even in that year, and even if the entire vote of Staten Island were marshalled for the runner-up, Beame, the outcome would not have been different. If the 37,148 votes for Lindsay and the 20,251 votes for Buckley were given to Beame, the new totals would be: Lindsay—

1,111,958; Beame—1,104,298; Buckley—320,775, with Lindsay still the winner. By contrast, every other borough could affect the outcomes of mayoral elections. In every election, except the landslide years of 1973 and 1981 when no one borough's votes could be decisive, even the second smallest borough, the Bronx, could have changed the outcome, at least to the extent of electing the runner-up.

The same conclusions apply also for election of the other two city-wide members. Tables XVI and XVII show respectively the closest elections since 1961 for Comptroller and President of the Council. Again, Staten Island's total vote could not alter the outcomes, but the vote of any borough could.

TABLE X

General Election Held Nov. 3, 1981

County	*Edward I. Koch (Dem.)*	*(Rep.)*	*Frank J. Barbaro (U.)*	*John A. Esposito (Cons.)*
New York	155,530	34,101	56,702	6,682
Bronx	110,470	21,951	22,074	7,634
Kings	218,334	42,958	48,812	15,388
Queens	217,045	58,767	31,225	26,515
Richmond	36,909	16,557	3,906	3,881
Totals	738,288	174,334	162,719	60,100

TABLE XI

General Election Held Nov. 8, 1977

County	*Edward I. Koch (Dem.)*	*Mario Cuomo (Dem.-Lib.)*	*Roy Goodman (Rep.)*	*Barry Farber (Cons.)*
New York	184,842	70,717	19,324	9,070
Bronx	116,436	75,754	6,102	7,624
Kings	204,934	153,134	11,491	16,576
Queens	191,894	186,590	18,460	20,453
Richmond	19,270	36,747	3,229	3,714
Totals	717,376	522,942	58,606	57,437

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TABLE XII

General Election Held Nov. 6, 1973

County	*Abraham D. Beame (Dem.)*	*Alfred Blumenthal (Lib.)*	*John J. Marchi (Rep.-Cons.)*	*Mario Biaggi (Dem.-Cons.)*
New York	158,050	101,117	45,803	17,882
Bronx	160,774	32,661	37,609	50,805
Kings	321,477	60,340	73,776	51,713
Queens	283,474	66,059	90,942	60,490
Richmond	37,355	5,120	28,445	9,096
Totals	961,130	265,297	276,575	189,986

TABLE XIII

General Election Held Nov. 4, 1969

County	*John V. Lindsay (L.-I.)*	*Mario A. Procaccino (D.-NP.-CSI.)*	*John J. Marchi (R.-C.)*
New York	328,564	99,460	61,539
Bronx	161,953	165,647	76,711
Kings	256,046	301,324	152,933
Queens	249,330	245,783	192,008
Richmond	16,740	19,558	59,220
Totals	1,012,633	831,772	542,411

TABLE XIV

General Election Held Nov. 2, 1965

County	*John V. Lindsay (R.-L.-IC.)*	*Abraham D. Beame (D.-CSFP.)*	*William F. Buckley (C.)*
New York	291,396	193,230	37,694
Bronx	181,072	213,980	63,858
Kings	308,398	365,360	97,679
Queens	331,162	250,662	121,544
Richmond	37,148	23,467	20,451
Totals	1,149,106	1,046,699	341,226

Affidavit of Frank V. Ponterio in Support of Motion

TABLE XV

General Election Held Nov. 7, 1961

County	*Robert F. Wagner (D.-Lib.-Bro.)*	*Louis J. Lefkowitz (R.-CA.-NP.)*	*Lawrence E. Gerosa (CP.)*
New York	265,015	174,471	36,893
Bronx	255,528	134,964	67,213
Kings	396,539	251,258	105,232
Queens	190,194	243,836	99,987
Richmond	30,145	31,162	12,279
Totals	1,237,421	835,691	321,604

TABLE XVI

Vote for Comptroller

General Election Held Nov. 4, 1969

County	*Abraham D. Beame (D.-NP.-CSI.)*	*Fioravante G. Perrotta (R.-L.-I.)*	*Vito P. Battista (C.)*
New York	153,818	281,591	19,055
Bronx	207,096	147,748	26,063
Kings	378,379	230,996	63,179
Queens	344,189	243,540	72,544
Richmond	36,055	34,561	18,686
Totals	1,119,537	938,436	199,527

TABLE XVII

Vote for President of the Council

General Election Held Nov. 4, 1969

County	*Sanford D. Garelik (R.-L.-I.)*	*Francis X. Smith (D.-NP.-CSI.)*	*Robert F. Kelly (C.)*
New York	310,801	124,208	18,693
Bronx	169,500	180,808	23,786
Kings	278,862	324,489	52,659
Queens	280,003	317,374	59,329
Richmond	35,270	34,939	17,563
Totals	1,074,436	981,818	172,030

14. As shown by the following census figures, Staten Island alone among the boroughs is experiencing a population growth.

TABLE XVIII

Borough	*1970 Census*	*1980 Census*	*% Change*
Bronx	1,471,701	1,169,115	— 20.6
Brooklyn	2,602,012	2,230,936	— 14.3
Manhattan	1,539,233	1,427,533	— 7.3
Queens	1,986,473	1,891,325	— 4.8
Staten Island	295,443	352,121	+ 19.2
New York City	7,894,862	7,071,030	— 10.4

Still considerably under-developed and virtually without public mass transit, Staten Island desperately needs significant capital improvement. Exhibit *X*, excerpts from "Community District Register for the Preliminary Budget", Fiscal Year 1984, illustrates the need for roads, sewers, schools, and other capital facilities to meet essential needs.

15. Examination of Exhibits V through IX shows that whether a borough is under-or over-represented compared with the ideal Board depends on the make-up of each particular coalition of members. In effect, Brooklyn sometimes benefits from the *per capita* over-representation of Staten Island, the Bronx, and Manhattan. Table XIX gives a summary of the number of cases in which Brooklyn is part of a coalition which enables the Board to act and which overall is under-represented, over-represented, or ideally represented (i.e., % difference = 0.00). As shown by the last row of the table, even the borough with the smallest *per capita* representation is under-represented in

fact in only about one-half of the cases requiring less than a unanimous vote. For unanimous votes, all boroughs are ideally represented.

TABLE XIX

Representation of Brooklyn	Full Board			Mayorless Board	
	1/2 Majority	2/3 Majority	3/4 Majority	1/2 Majority	2/3 Majority
Under-represented	43	15	6	22	13
Over-represented	26	11	4	13	9
Ideally represented	7	4	4	4	3
Totals	76	30	14	39	25
% Under-represented	56.6	50.0	42.9	56.4	52.0

/s/ Frank V. Ponterio
Frank V. Ponterio
766 Pelton Avenue
Staten Island, New York 10310
(212) 981-7953

Dated: September 30, 1983
Staten Island, N.Y.

Sworn to before me this
30th day of September, 1983
/s/ David W. Lehr

Plaintiffs' Notice of Motion for Summary Judgment, dated December 6, 1983

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
81-CV-3920 (E.R.N.)

MORRIS, et al.,

Plaintiffs,

—against—

BOARD OF ESTIMATE, et al.,

Defendants,

—and—

PONTERIO, et al.,

Intervenors.

Based upon the affidavits, exhibits, memorandum, local rule 3(g) statement submitted herewith, as well as the entire record herein, the plaintiffs will move for summary judgment declaring the present structure of the Board of Estimate violative of equal protection, in the courtroom of the Honorable Edward R. Neaher at the Federal Courthouse at 225 Cadman Plaza, Brooklyn, New York, United States District Judge, on January 20, 1984 at 10:00 A.M. or as soon thereafter as this motion may be heard.

Dated: December 16, 1983

/s/ RICHARD EMERY
Richard Emery
Arthur Eisenberg
Attorneys for Plaintiffs
New York Civil Liberties Union
84 Fifth Avenue
New York, NY 10011
(212) 924-7800

Appendix to Plaintiffs' Memorandum of Law Submitted to the United States District Court Eastern District of New York in Support of Their Motion for Summary Judgment on Remand from the Second Circuit, filed December 20, 1983

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7. New York State Charter Revision Commission for New York City, *Borough Government Report* (1973), pp. i-55
8. J. Still, *Political Equality and Election Systems*, 91 Ethics 375-394 (April 1981)
9. F. Grad and A. Charlo, *Floaterial Districts*, Report to New York City Charter Revision Commission (1982)

Exhibit (1): Annexed to the Appendix to Plaintiffs' Memorandum of Law

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

83-CV-3920 (ERN)

BEVERLY MORRIS, et al.,

Plaintiffs,

—v—

THE BOARD OF ESTIMATE, et al.,

Defendants.

and

FRANK V. PONTERIO and ROBERT A. STRANIERE,

Intervenor-Defendants.

AFFIDAVIT OF HERMAN BADILLO

I, Herman Badillo, being duly sworn upon oath, depose and say, as follows:

1. I am a former member of the Board of Estimate, having served as Bronx Borough President from January 1, 1966, until December 31, 1969. Prior to my service on the Board of Estimate, I worked closely with that body as City Deputy Commissioner of Real Estate from January 1962 until November 1962, and then as City Commissioner of Housing Relocation, from November, 1962 until August, 1965. In 1970 I was elected to Congress where I served three and a half terms representing the 21st District in the Bronx. On November 30, 1977, I resigned my Congres-

Exhibit 1 Annexed to the Appendix to Plaintiffs' Memorandum of Law

sional office to become Deputy Mayor to Mayor Koch with special responsibilities for developing the renewal and revitalization of the South Bronx pursuant to the federal commitment made by President Carter after his visit to the South Bronx in 1977. In that capacity, I once again worked closely with the Board of Estimate. Therefore, I am intimately familiar with the operations and practices of the Board of Estimate and my statements to this Court are based upon my first-hand knowledge.

2. The present structure of the Board of Estimate precludes it from fulfilling its historic function of coalescing the citywide and local interests that coexist within the borders of the City of New York. Historically, when the boroughs of New York were separate governmental entities with significant administrative and executive powers, the Board of Estimate served the purpose of gathering in one body the City's most powerful elected officials, each of whom administered major governmental entities with either citywide or boroughwide jurisdiction. During this period of New York's history, the structure of the Board of Estimate required the leaders of strong borough governments to compromise and agree with one another, as well as with the citywide officials, in order to formulate City policy.

3. Since the 1963 Charter Revision, when the last vestiges of significant borough government functions were eliminated, the Board of Estimate has taken on a very different role. It no longer serves its original function by bringing together local and citywide executives, but rather it now exists as a body of three citywide executives

and the borough presidents who, under the present circumstances, have no significant function other than representation of their respective boroughs on the Board. However, none of the four large boroughs of New York City (all but Richmond) can be adequately represented by its borough president. Each borough is so heterogeneous with respect to economic, religious, racial, and ethnic disparities that neighborhoods which lie within each borough have diametrically opposed interests. Under the present scheme local interests are no longer effectively represented. Thus, in the Bronx, for example, Riverdale and the North Bronx have little or nothing in common with the South Bronx. In Brooklyn, Bedford-Stuyvesant, Bushwick and Brownsville have no common local interests with Brooklyn Heights and Park Slope. In Manhattan, it is impossible to represent effectively Harlem and the Upper East Side though they are contiguous. The sad result is that representation by the borough presidents is narrowly limited to the particular consistency by which each borough president is elected. Since all but five of the borough presidents elected during the 82-year existence of the Board of Estimate have been white and middle-class, minorities and their neighborhoods have been unfairly represented on the Board of Estimate during most of its history.

4. It was in large part for this reason that David Dinkins ran for the borough presidency of Manhattan in 1979. He stated that the minority community and neighborhoods of the City as a whole, deserved some representation on the Board of Estimate. Of course, Mr. Dinkins did not win a seat on the Board and minorities remain entirely unrepresented on the Board at the present time.

5. It is the present structure of the Board of Estimate which precludes effective neighborhood representation, especially of minority groups. Because of the size of the boroughs and because of their heterogeneity, minority interests even in contiguous neighborhoods are not provided any effective representation on the Board of Estimate under its present structure. Given the separate representation provided for the 350,000 people of Staten Island under the present Board structure, it seems genuinely unfair to deny equal representation to other larger contiguous population groups which have united interests based upon well-defined neighborhood identification.

5. The tragedy and inequity of the absence of fair representation on the Board of Estimate was perhaps never better illustrated than in the case of the Charlotte Street renewal project for the South Bronx. In 1977, President Carter visited the South Bronx and promised renewal of the area as the first step of a federal program to restore housing in America's decaying inner cities. On November 16, 1978, the Board of Estimate overwhelmingly approved the project based upon President Carter's assurances that federal aid would finance renewal. With great hope and optimism the planning for a major urban renewal project began, with national and international fanfare. On February 8, 1979, however, only two and a half months later, the issue again came before the Board on the issue of how the renewal area should be remapped. Two borough presidents—Queens and Brooklyn—as well as the City Council President reversed their earlier positions on the issue, dooming the entire project by a 7 to 4 vote. The favorable votes came only from the Mayor, Staten Island and the

Bronx itself. This turnaround occurred despite the official support of the President of the United States, Governor, and Mayor. Instead of building new housing, the City is now filling the gaping holes in abandoned housing with decals.

6. Were the Board of Estimate truly representative of groupings of common interests within the City, as it is in the case of Staten Island, the result of the Charlotte Street project might well have been different. Were the Brooklyn's and Queens' representatives to this body not primarily concerned with the middle-class interests of the constituents who elected them, these borough presidents might have voted otherwise. Were the Board comprised of representatives from neighborhood areas *within* each of the boroughs instead of boroughwide representatives, the voice of minority interests might have emerged from a city-wide coalition of minority neighborhoods. Were interest groups even of the size of Staten Island—350,000—represented on the Board, the voice of fair representation for minorities may have been heard through the legislative process of vote trading which may well have resulted in respect for the dire need of minorities in the South Bronx.

7. The Charlotte Street project is merely one notable example of the failure of the Board of Estimate to represent local, neighborhood interests through its present structure. Though the Bronx Borough President supported the project, and, therefore, it can be argued that local interests were represented, the more accurate characterization of this international disgrace for United States urban policy must focus on the suppression of potential support for the

project from vocal and active minority interests in Brooklyn and Queens. These interest would have favored the project if the structure of the Board of Estimate had permitted representation of homogeneous groups other than Staten Island. The local interests in Queens and Brooklyn in the Charlotte Street case, and many other such neighborhood interests in other cases, are suppressed by the present borough-based scheme of representation on the Board of Estimate.

8. As explained above, this sort of subjugation of important local interests occurs as a result of representation of an entire borough by one official who is elected, in almost every instance, by a white middle-class constituency and, who, therefore, usually fails to represent many of the neighborhoods within his "district." Notwithstanding the narrowness of the borough president's usual constituency, the borough presidents are important and influential insofar as they are members of the Board of Estimate. Their influence and strength derives as much from their lobbying and debate functions on the Board as from the exercise of the one vote that each is granted. Because the borough presidents have access to the three most powerful city officials as well as to each other, and because they participate in every aspect of exercising the Board's extensive powers, the borough presidents play a major role in governing the City.

9. The large number of unanimous votes on the Board is by no means reflective of the divisions on the Board. Unanimous votes are often the result of trading support, lobbying, debate and deference to the particular expertise

of one or more Board members. Very often the lack of dissent or vote division is no indication of the stormy process which lies behind unanimous decisions. Moreover, many of the most significant issues resolved by the Board are settled by divided votes. A good example was the Charlotte Street project I have described above. Thus, though it may not be clear from the predominant pattern of unanimous voting by Board members, the actual day-to-day process of resolving issues on the Board involves a substantial, important, and often crucial role for the borough presidents.

10. It is especially the case that the borough presidents hold the key to the Board's decisions when issues before the Board involve major questions relating to the future of the City. Such issues very often divide the citywide members of the Board. In fact, this division of the citywide Board members occurs frequently as a result of the political reality that the Comptroller and City Council President are often engaged in an ongoing campaign for the Mayor's office, and the Mayor is often running for re-election in competition with these officials. Much of the effort of the citywide officials is, thus, spent on distinguishing themselves from one another in their incessant quest for the mayoralty. The result of this on-going campaign is frequent divisions between the citywide officials on controversial city issues. Even when no incipient political campaign exists to divide the citywide members, the citywide officials, as a result of their different positions and responsibilities, often have conflicting views of citywide interests. Any such divisions among the citywide officials on the Board vests enormous power in the borough presi-

dents whose votes in these circumstances determine the outcome of many of the most significant city controversies.

11. Since the borough scheme of representation after the evisceration of the powers of borough government in 1963 does not constitute a fair and meaningful basis for representation of the people of the City of New York, and since borough "districts" for the Board of Estimate result in subjugation of significant homogeneous neighborhood groups, I can see no convincing reason to maintain the Board's present borough structure. Moreover, as I have described above, the inequity of permitting only one borough—Staten Island—to have a truly representative member of the Board, argues forcefully for abolition of the borough scheme of representation on the Board. In light of the disparities in voting power between the citizens of the different boroughs, it seems to me unsupportable to maintain this scheme of Board of Estimate representation.

/s/ Herman Badillo
Herman Badillo

Sworn to before me this
1st day of December, 1983.

/s/ Edmee Quinones
Notary Public

Exhibit (2): Annexed to the Appendix to Plaintiffs' Memorandum of Law

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81-CV-3920 (ERN)

BEVERLY MORRIS, et al.,

Plaintiffs,

—v—

THE BOARD OF ESTIMATE, et al.,

Defendants,

and

THE BOARD OF ESTIMATE, et al.,
FRANK V. PONTERIO and ROBERT A. STRANIERE,

Intervenor-Defendants.

AFFIDAVIT OF WENDELL FOSTER

I, Wendell Foster, being duly sworn upon oath depose and say as follows:

1. I am the City Councilman for the Ninth District in the Bronx. I have served in that capacity for five years. I am and have been the pastor at the Christ Church on Forest Avenue and 161st Street in the Bronx for the past 18 years.

2. I represent a district which is predominantly black and poor. The Morrisania and Highbridge neighborhoods

Exhibit 2 Annexed to the Appendix to Plaintiffs' Memorandum of Law

make-up most of the population in my district. The greatest need of my constituents is housing and jobs.

3. Under the present structure of the Board of Estimate the Bronx Borough President has the responsibility of representing the people of my community on that body. This simply has not occurred. The Bronx Borough President has traditionally been answerable only to the more powerful white middle-class constituency. Thus, in my experience the Bronx Borough Presidents have done little or nothing to serve the communities I represent.

4. Importantly, the most compelling needs of my district cannot be served by the City Council. The Board of Estimate's functions and powers over economic distribution are the key to addressing the difficulties of revitalizing communities such as mine. It is, therefore, often frustrating to serve on a body that has little or no effective power to help my constituents. It is even more frustrating to observe constantly the opportunities to help my community being passed-over because the Bronx Borough President is unresponsive to my community's needs.

5. Were communities such as mine to have representation on the Board commensurate with our population, the minority interests in the City could join together to see that the Board exercised its powers in a manner which is responsive to our needs. Under the present structure such an alliance is precluded by the borough president system of representation on the Board and, as a result, my constituents are effectively disenfranchised. The result is that the Board serves primarily the interests of the rich and middle class.

Exhibit 2 Annexed to the Appendix to Plaintiffs' Memorandum of Law

6. In my view this situation is unsupportable and destructive. Since this *de facto* disenfranchisement flows in large part from the one person, one vote disparities of the Board of Estimate's structure, which is based on borough "districts," the restructuring of this body is in the interests of the City as a whole. If the Board of Estimate were to be restructured into districts which allow for fair representation of the poorer, presently underrepresented neighborhoods, both the voting disparities and the disenfranchisement of minority neighborhoods would be alleviated.

/s/ Wendell Foster
Wendell Foster

Dated: December 12, 1983
New York, New York

Sworn to before me this 12th day of December, 1983.

/s/ Richard Emery
Notary Public

Exhibit (3): Annexed to the Appendix to Plaintiffs' Memorandum of Law

UNITED STATES DISTRICT COURT

Eastern District of New York

82-CV-3920 (ERN)

Beverly Morris et al.,

Plaintiffs,

—against—

Board of Estimate et al.,

Defendants.

Affidavit of Edward L. Sadowsky

Edward L. Sadowsky, being duly sworn deposes and says:

1. I am a member of the city council of the City of New York and have served in that body since January 1, 1962. I am presently chairman of the finance committee.

2. I make this affidavit to express my views on several anomalies in the governance of New York City which bear on the issue before the court.

3. I believe that the most important legislative function in the city is the adoption of the budget. Unlike the federal and state governments, the city is not vested with broad policy-making powers. Its principal role is the delivery of municipal services. As a consequence, most major policy decisions—whether it is the proper number of police officers or whether the city should provide an all-day kin-

dergarten for all eligible children—are articulated in the city's expense budget. Other policy decisions relating to the nature and condition of the city's infrastructure—its roads, highways, sewers and water supply—likewise are determined by means of the city's capital budget.

4. Under current law, the City Council and board of estimate must act concurrently on the budget, and if they do not concur, they must attempt to reconcile their differences in a conference.

5. Whatever may be the virtues of bicameral legislatures at the federal or state level, it seems to me that bicameralism plays no useful purpose in New York city and effectively impedes the exercise of legislative power.

6. While the mayor votes on the board of estimate in the exercise of its land use, contracting and franchise powers, he has no vote on the adoption of the budget. The board, for that purpose, consists of the comptroller, the president of the council and the five borough presidents. The comptroller is, of course, the city's chief fiscal officer with a broad range of executive functions including the audit of city expenditures. There appears to be no sound reason why the comptroller should also be vested with a legislative role in budget adoption. Indeed, it could be argued that it is a conflict for the officer charged with the duty of auditing expenditures to participate in deciding how city funds should be spent.

7. The office of president of the council is devoid of virtually all power except for the vote on the board of estimate. While it may seem that the president is an emissary from the council to the board, as an actual matter, that is not the case. The role of the president of the city council is very similar to that of the vice president of the United States in the senate. The president of the council presides at council meetings but has no vote, except in the case of a tie. The president, neither historically nor by charter definition, is a leader of the council. That role is performed by the majority leader of the council and the committee chairs, as is the case in the United States senate. There is, therefore, no rationale for the president of the council voting on the adoption of the budget based upon the role played by the president of the council.

8. The five borough presidents would appear to represent regional interests, much like the United States senators, as contrasted with the one person, one vote principle which governs the election of council members. However, whatever value the analogy might have had at the outset of the century, today, the comparison has no value whatsoever because of both the changing powers of the borough presidents and the changing character of the boroughs they represent.

9. At the outset of the century, the borough presidents had considerable powers, particularly with respect to street, sewers and public works, and it was logical, because of these powers, that they should play important roles in central city government.

10. Beginning with the charter revision of 1963, the power of the borough presidents in their boroughs has been almost completely eliminated. The functions formerly performed by them have been transferred to the central city

government. Therefore, borough presidents no longer represent a regional government with considerable independence and power.

11. As a consequence, in recent years borough presidents have principally taken on the role as advocates of borough needs as they perceive them and as mediators between the people in their boroughs and city hall.

12. But even here, circumstances have changed so remarkably that it is questionable whether there is any such role to be played.

13. In recent years, there has been a considerable erosion in the identity which citizens make with the boroughs in which they live with a particular borough. In the borough of Queens, it is questionable whether that identification was strong at any time. People in Queens always considered that they lived in Forest Hills or Corona or Long Island City or Astoria, rather than in Queens. But even the citizens of the Bronx and Brooklyn who years and years past has a much stronger sense of borough identity, now are likely refer to themselves as coming from communities within a borough rather than the borough itself. For instance, people in the Bronx are likely to refer to communities such as the south Bronx or Riverdale; the people in Brooklyn are likely to live in Bedford Stuyvesant, Brooklyn Heights or Canarsie.

14. At the same time, and perhaps as the cause for community, rather than borough identification, the boroughs have become extremely heterogeneous. Each of them, with the possible exception of Staten Island, has developed

within their boundaries extraordinarily diverse economic and ethnic and religious patterns.

15. As a consequence, people living in Brownsville in Brooklyn are more likely to find a greater community of interest with people in the South Bronx than with the residents of Brooklyn Heights, for instance. Under these circumstances, it is virtually impossible for borough presidents to advocate successfully borough needs or to mediate on behalf of their citizens when in fact, those needs are so disparate and, indeed, in some respects inconsistent.

16. It may be argued, therefore, that the boroughs are no longer meaningful political subdivisions for the purposes of city government. Rather, more meaningful political subdivisions are the various communities within the borough, and a better solution for legislative power in the city of New York is to distribute to those communities the right to elect their legislative representatives.

17. There are several other anomalies in the present structure of city government. As I have indicated, the budget constitutes the major policy document in the City and requires concurrent vote by the board of estimate and the city council. However, the concomitant duty to raise the taxes necessary to fund the budget rests entirely with the city council. The board of estimate, therefore, votes on expenditures of money but has no responsibility to vote for the taxes which fund the budget.

18. The second most important municipal legislative function is the adoption and modification of the zoning resolution. In New York City, this is in the exclusive do-

Exhibit 3 Annexed to the Appendix to Plaintiffs' Memorandum of Law

main of the board of estimate, and the city council has no role. Thus for this quintessentially legislative function of determining land use, the board of estimate whose distribution of votes bears absolutely no resemblance to the number of citizens represented, acts alone while the city council which abides by a strict one person one vote principle, has no role.

19. As for the Board's power with respect to franchises and contracts, I understand that while these may not be strictly defined as legislative functions, they are functions which are performed by the city councils of other large cities having mayor-council forms of government.

20. I must say in conclusion, that I do not view this discussion as a contest for power between the board of estimate and the city council. It is my view that the city would be better served by a unicameral legislature with its various and diverse communities represented under those constitutional principles which require each person's vote to be weighed equally and which prohibit discrimination in the drawing of district lines. Whether the resulting body is called the board of estimate or the city council hardly matters at all.

/s/ Edward L. Sadowsky
Edward L. Sadowsky

Sworn to before me this 8th day of December, 1983.

/s/ Selma S. Krisel
Notary Public

Exhibit (4): Annexed to the Appendix to Plaintiffs' Memorandum of Law

UNITED STATES DISTRICT COURT

Eastern District of New York

82-CV-3920 (ERN)

Beverly Morris et al.,

Plaintiffs,

—v—

Board of Estimate et al.,

Defendants.

Affidavit of Steven J. Brams

Affidavit of Steven J. Brams

I, Steven J. Brams, after being duly sworn upon oath depose and say as follows:

1. I am Professor of Politics at New York University. I hold a Ph.D. in Political Science from Northwestern University. I have specialized in the application of mathematical models to electoral systems, and have published several books and articles on the subject. My *curriculum vitae* is attached to this affidavit as Appendix A.

2. I submit this affidavit in support of Plaintiffs' contention that the structure of the New York City Board of Estimate affords vastly unequal representation to citizens of New York's different boroughs, and in opposition to the mathematical analysis employed by Intervenor-Defendant Ponterio (hereinafter referred to as "Intervenor.")

Exhibit 4 Annexed to the Appendix to Plaintiffs' Memorandum of Law

3. My affidavit is divided into two sections. In Section I, I criticize Intervenor's "weighted vote" analysis of the Board. In Section II, I address other issues raised by Intervenor and by Plaintiffs.

Section I

4. Intervenor's so-called "adaptation of the aggregate method of analyzing floterial districts" (IA-10),* as applied to the Board of Estimate, is fundamentally flawed because it systematically overstates the voting power of the citywide representatives. As a result, population differences among the boroughs are made to appear unimportant.

5. The way in which Intervenor's "weighted vote" schemes does this can be seen by applying his method to a hypothetical City and Board which mirror the real City and Board. Imagine a City of 5 boroughs, A through E, with populations as follows:

Borough	*Population*
A	6
B	5
C	4
D	3
E	1

* References to "Intervenor's Affidavit" in Support of his Motion to Deem Issues Resolved will be made in the form "IA-page number."

Exhibit 4 Annexed to the Appendix to Plaintiffs' Memorandum of Law

The total city population is 19. (Note that the borough populations are roughly proportional to the borough populations of New York City.)

Assume that the Board of Estimate in this model City duplicates the real Board of Estimate, consisting of 3 citywide representatives elected at large, with two votes each, and one representative from each borough, with one vote each. Following Intervenor's analysis, each citywide member's vote is weighted by the population s/he represents (19,) as is each borough member's.

Representative	*No. of Representatives*	*Population Represented*	*Actual Votes*	*Weighted Votes*
Citywide	3	19	6	57
Borough A	1	6	1	6
Borough B	1	5	1	5
Borough C	1	4	1	4
Borough D	1	3	1	3
Borough E	1	1	1	1

Total Citywide Actual Votes = 6

Total Citywide Weighted Votes = 57

Total Borough Actual Votes = 5

Total Borough Weighted Votes = 19

Intervenor's analysis has transformed the citywide members' actual 6-5 advantage in votes into a 57-19, or 3-1, advantage in weighted votes.*

* Moreover, Intervenor's methodology completely ignores the fact that citywide members have two votes each. His disclaimer ("The current 'votes' of Board members . . . are interpreted simply

(footnote continued on following page)

Exhibit 4 Annexed to the Appendix to Plaintiffs' Memorandum of Law

6. The distortion is exacerbated when Intervenor computes weighted vote totals for various Board coalitions, and compares them with weighted-vote totals for an ideal Board in which all boroughs have equal populations. Because the *citywide* votes are improperly over-weighted under Intervenor's methodology (by approximately 3:1 [6:1 if methodology consistently applied—see footnote below]), *borough* population deviations from the ideal appear insignificant. This is true because all winning coalitions must include citywide members, whose weighted votes, under Intervenor's improperly skewed method, far overbalance the votes of Borough Presidents. (Recall that in arriving at "weighted votes," each citywide member's vote is multiplied by the entire City population, while each Borough President's vote is multiplied only by the population of his borough, largely swamping the effects of the very different-size boroughs in the weighted-vote totals.)

Thus, population disparities among the boroughs are effectively defined away in Intervenor's model, which makes the *three citywide members' votes* collectively count three (or six) times as much as the *five Borough Presidents'* votes, even though the citywide members enjoy a bare 6-5 majority in actual votes.

(footnote continued from previous page)

as defining the coalitions of members which enable the Board to act" (IA-11) is illogical. If, as Intervenor argues, the residents of a borough are "represented once" when their Borough President casts a vote, they must be "represented twice" when a citywide member casts two votes. Therefore, Intervenor's analysis, carried through to its logical end, results in a citywide to borough weighted-vote ratio not of 3:1, as indicated in paragraph 5 above, but of 6:1.

Exhibit 4 Annexed to the Appendix to Plaintiffs' Memorandum of Law

Section II

7. Intervenor's attempt to show that "Staten Island's opportunity to determine the outcome of city-wide elections is non-existent" (IA-20) fails in two respects. First, the data for past elections are mere happenstance. They demonstrate only that Staten Island's voting population is smaller than the other boroughs'. Second, since each citizen of the city casts one vote in the citywide elections, each citizen, regardless of residence, has an equal probability of casting a tie-breaking vote. The citizens of Staten Island have as meaningful an opportunity to elect citywide officials as do the citizens of the other boroughs.

8. The Board of Estimate's unusual structure creates problems in devising appropriate quantitative methods for analyzing citizen representation. The challenge this Court faces was recognized by the Second Circuit in its opinion in this case. But an examination of the underlying goals of borough and citywide representation on the Board provides guidance.

9. The Board is structured to assure representation of both local interests and the interests of the city as a whole. These interests will sometimes be in conflict; the Board's structure is an attempt to accommodate the clash between local and citywide concerns. Each citizen votes for officials who will represent his/her interests as a citizen of the city, and votes separately for a representative of his/her local interests.

10. I am of the opinion that *any* quantitative method for analyzing the Board that attempts to allocate the city-

wide members' votes among the boroughs is inevitably arbitrary and *ad hoc.* To the extent that Plaintiffs have proposed models which do that, I disagree with them. In my opinion, the most appropriate methodology for analyzing the representation of individual citizens on the Board of Estimate is one which treats the two groups of representatives *separately.*

11. Since the citywide members are elected at large, they pose no equal-representation problem. The Borough Presidents, however, are elected from districts with vastly different populations, and it is their citizens who are denied equal representation, with residents of Staten Island (population: 352,121) having per capita representation approximately six times that of residents of Brooklyn (population: 2,230,936). Such an extreme *quantitative* disparity seems to me difficult to justify for political, historical, or any other qualitative reasons arising out of customs or tradition.

12. Plaintiffs have suggested that one way to redress representational inequalities on the current Board would be to create a structure featuring 19 single-member districts of nearly equal population, and to give citywide members 7 votes each. The creation of single-member districts would be one possible solution to the present problem. Other solutions might include a weighted-voting scheme carefully designed to avoid certain problems that may occur in such systems, or a proportional representation system geared to political parties, ethnic groups, or other appropriate interests. Whatever remedy is eventually adopted, it is clear that the *status quo* does not pro-

vide equal representation to all New Yorkers, regardless of residence. I know of no grounds for permitting such an egregious violation of the one-person, one-vote principle in Borough representation.

/s/ Steven J. Brams
Steven J. Brams

Dated: November 21, 1983
New York, New York

Sworn to before me this 21st day of November, 1983

/s/ Melvin Goldstein
Notary Public

Exhibit (5): Annexed to the Appendix to Plaintiffs' Memorandum of Law

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81-CV-3920 (E.R.N.)

BEVERLY MORRIS, et al.,

Plaintiffs,

—v—

THE BOARD OF ESTIMATE, et al.,

Defendants.

and

FRANK V. PONTERIO AND ROBERT A. STRANIERE

AFFIDAVIT OF EMANUEL TOBIER

I, Emanuel Tobier, having been duly sworn upon oath, depose and say as follows:

1. I am Professor of Economics and Planning in the Graduate School of Public Administration at New York University. I hold a Ph.D. in Economics from New York University. I have specialized in the economy and demography of New York City, and have published several articles on these subjects. I have also served as Chief Economist at the Regional Plan Association of New York from 1964-1968, and as Chairman of the City's Rent Guidelines Board, from 1974-1975. My *curriculum vitae* is attached to this affidavit as Appendix A.

2. United States Census data reveal that since World War II, and indeed, in the past decade or so, the characteristics of the populations of New York City's four large boroughs have changed dramatically. Brooklyn, the Bronx, and Queens, all once largely populated by white working-class and middle-class families, have seen large increases in their low-income, black, and Hispanic populations. Manhattan's population of poor people and racial minorities expanded through the 1960's, though it has declined in recent years.

Exhibit 5 Annexed to the Appendix to Plaintiffs' Memorandum of Law

3. All four of the large boroughs are now marked by the diversity of their populations along income, racial, and ethnic lines. Only Staten Island has been relatively untouched by change in its population characteristics. Staten Island remains today, as it has been since World War II and before, a white, middle-class and working-class borough.

4. Distinct population groups in the large boroughs tend to settle in distinct neighborhoods. Thus it would easily be possible, using City Planning Commission data on income levels by community planning district,* to delineate several districts of approximately Staten Island's population in each of the larger boroughs. These districts would each in their own way be as homogeneous as Staten Island, and could be expected to exhibit relative uniformity of political interests.

5. For exampe, Table I (appended to this affidavit as Appendix B displays some of this data for Staten Island's

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* New York Department of City Planning, "1980 Census Data: Part One—Income; New York City, Boroughs, Community Districts," 1983.

three community planning districts, for districts 8, 11 and 13 in Queens, for district 3, 4, and 16 in Brooklyn. The three contiguous Queens districts encompass the neighborhoods of Bayside, Auburndale, Douglaston-Little Neck, Oakland Gardens, Fresh Meadows, Utopia, Pamonok, Kew Gardens Hills, Hillcrest, Briarwood, Jamaica Hills, Jamaica Estates, Glen Oaks, New Hyde Park, Floral Park, Bellerose, Bellaire, Queens Village, Cambria Heights, Laurelton, Rosedale, and Brookville. The data demonstrate that these districts have much in common with each other and with Staten Island. On the other hand, the three contiguous Brooklyn districts encompassing the neighborhoods of Bedford Stuyvesant, Bushwick, and Ocean Hill-Brownsville, obviously are quite different demographically from Staten Island, but relatively similar to each other. Staten Island, it can be seen, is fairly homogeneous.

6. In fact, it is fair to say that there is considerably more uniformity of population characteristics between neighborhoods in different boroughs than between neighborhoods within boroughs. Thus, for example, Bedford-Stuyvesant is more similar to the South Bronx than to Brooklyn Heights or Bay Ridge. Forest Hills is more similar to Bay Ridge or to Staten Island than to Jamaica.

7. In light of the heterogeneity of the large boroughs, it seems to me senseless to speak of "local interests" which encompass an entire borough, and can be represented by a single elected official, the Borough President. There really are no such interests. Instead, each borough contains various neighborhoods inhabited by different population groups whose interests can be expected to conflict strongly. No

single elected representative of a borough could be expected adequately to represent these conflicting interests.

8. Although the system of borough representation on the Board of Estimate may have been sensible when the population of each borough was less diverse than today, or when boroughs had strong borough governments which made them meaningful as political subdivisions, in my opinion it is now a historical anachronism. Maintaining this system serves largely to assist Staten Island in protecting its homogeneity at the expense of the rest of the City. Citizens of the larger boroughs are unavoidably denied fair and equal representation on the Board by this system which, on the one hand, grants to Staten Island its own representative, and on the other, submerges homogeneous communities of equal size within the extreme diversity of the larger boroughs.

/s/ Emanuel Tobier
Emanuel Tobier

Dated:
New York, New York

Sworn to before me this 13th day of December, 1983.

/s/ Melvin Goldstein
Notary Public

APPENDIX "B" TO AFFIDAVIT OF EMANUEL TOBIER

	Staten Island Districts			Queens Districts			Brooklyn Districts		
	#1	#2	#3	#8	#11	#13	#3	#4	#16
Total Number of Families	35,593	27,472	28,289	35,803	32,280	44,403	31,850	23,421	17,929
Percent White Families*	77.2	87.5	97.6	83.8	91.2	53.6	4.6	39.1	5.3
Percent Black Families*	14.9	1.1	0.5	7.7	15.8	37.3	83.1	27.8	85.4
Percent Hispanic Families*	7.3	3.4	3.0	8.99	3.3	6.7	13.3	57.3	15.5
Total Number of Households	48,438	33,564	32,405	50,469	41,430	61,160	48,227	30,141	23,952
Percent Households Receiving Social Security	27.6	22.9	19.1	27.8	28.5	25.7	18.8	17.2	18.9
Percent Households Receiving Public Assistance	10.6	5.4	3.8	5.0	4.0	6.6	34.4	39.1	39.1
Median Household Income	$17,720	$22,292	$24,645	$20,230	$22,865	$21,925	$7,857	$6,955	$7,540
Mean Household Income	$20,230	$24,796	$25,879	$23,651	$26,186	$24,073	$10,457	$9,758	$9,999

Exhibit (6): Annexed to the Appendix to Plaintiffs' Memorandum of Law Submitted to the United States District Court Eastern District of New York

W. Sayre and H. Kauffman, *Governing New York City* (1960)

GOVERNING NEW YORK CITY

Politics in the Metropolis

WALLACE S. SAYRE
Eaton Professor of Public Administration
Columbia University

HERBERT KAUFMAN
Associate Professor of Political Science
Yale University

RUSSELL SAGE FOUNDATION
New York - 1960

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CHAPTER XVII

The Board of Estimate

THE BOARD OF ESTIMATE occupies the center of gravity in the city's political process. Almost all other participants ultimately converge upon the Board because of the inclusiveness of its powers. The other participants may begin their efforts elsewhere—with the party leaders, or the Mayor, or department heads—but because the Board's consent is so often necessary before an action can be taken, most participants eventually must come to the Board. Some contestants prefer to begin with the Board.

The Board also provides, in its biweekly public meetings, the central stage for the city's political contest. On no other occasion can most of the participants be assured of an equally favorable opportunity to speak directly to so important a group of the city's decision-makers: the eight members of the Board (the Mayor, the President of the Council, the Comptroller, the five Borough Presidents) on the dais; the Deputy Mayor, the City Administrator, the Director of the Budget, and usually several department and agency heads in attendance near the dais; numerous interest group leaders on the list of speakers or in the audience; representatives of the press and other communication media present to report the proceedings to a larger public. All these together act as a powerful magnet to bring most of the participants before the Board, to speak directly to its members, to recruit allies, to refute competitors, to demonstrate their alertness and influence, to reach the ears of the general public.

The Board is, however, more than a center of gravity and the provider of a central stage for the city's political contest. The Board of Estimate as an institution is itself also a contestant, perhaps the most powerful single participant in the city's political process. This power is the result of a number of extraordinary characteristics combining to make the Board a unique political and governmental institution. It has the most generous grant of formal powers of all the city's governmental institutions; its eight members are the most influential elected officials in the city government; it has developed a mode of operation which maximizes both its formal and informal powers; the relationships of its members with the party leaders are close and usually stable; it has high prestige with the other participants, particularly with those to whom it provides a public forum; and its institutional life, especially its informal processes, is surrounded by a helpful amount of mystery.

The story of the Board of Estimate is the history of an institution steadily acquiring more formal power, regularly enhancing its informal powers, increasingly fulfilling its own expectations as an institution. This institutional success has been achieved most clearly at the expense of the Board of Aldermen and its successor, the Council—but also at the cost of the Mayor.

THE BOARD'S ASSETS: FORMAL AND INFORMAL

The Board's Formal Powers

The Board of Estimate is endowed by the charter with broad powers, crucial to the city's political contest. These powers are in four categories: (1) those shared with the Council; (2) those exercised without Council participation; (3) the Board's "residual" powers; (4) Board powers subject to the Mayor's veto and those not subject to veto.

Powers Shared with the Council. The Council has "the sole power to adopt local laws . . . without requiring the concurrence of any other body or officer" except that the Mayor's veto requires a two-thirds vote of all councilmen to override, certain local laws must be submitted to referendum, and the Board of Estimate must concur in specified instances. These instances are described by the charter as follows: "A local law amending and repealing any provision of this charter, or transferring or changing the powers and duties of, or conferring powers or duties upon, or prescribing the qualifications, number, mode of selection or removal, terms of office or compensation of officers or employees of the city or of any agency, or reducing or repealing taxes, fees or charges receivable by the city or interest or penalties thereon, shall not become effective unless approved by the board of estimate." It has been difficult for the Council to discover local laws which do not come within this requirement. The Council consequently has no important power in adopting local laws which the Board does not share on equal terms; the Board is, in effect, the upper chamber in a bicameral city legislature.

The Board also shares with the Council its powers in the enactment of the expense budget, but on terms advantageous to the Board. For, while the Board may make any changes it wishes in the Mayor's executive budget, the Council in considering the budget as adopted by the Board of Estimate may only "reduce or omit any item in the budget . . . but it may not add or increase any item or vary the titles, description, terms or conditions of administration specified therein." Since the Mayor may veto any Council change in the budget, and a three-fourths vote of all councilmen is necessary to override the veto, the Board of Estimate may accurately regard the Council's share in the expense budget process as merely formal and symbolic, subtracting nothing of importance from the Board's monopolistic position.

In the enactment of the capital budget, the Board also must share formal power with the Council which may, in considering the capital budget

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adopted by the Board, "strike out in its entirety any authorization . . . but may not add to or increase or vary the terms or conditions of any authorization. . . ." If during the year the Board adds projects to, or increases the authorization for a project in, the capital budget, the Council's consent is required. The Council has found no way to use either of these powers as a device for sharing with the Board in the capital budget process.

In these three fields of formal powers—the enactment of local laws, the expense budget, the capital budget—the Board of Estimate has the dominant role. In the adoption of local laws the Board has an equal voice with the Council in all legislation of any importance; and the Board's greater institutional and political powers mean that, while the Board may usually influence the Council, the Council can rarely influence the Board. In both the expense budget and capital budget processes, the Board has the dominating role, the Council a minimal one.

Nor does the Board share these powers with the other participants in the city's political contest. The Mayor, the department and agency heads, and the City Planning Commission (in the capital budget process only) have their various roles, but it is the Board of Estimate which has the central role in each of these three processes.

Board Powers Not Shared with the Council. The Board of Estimate would be a powerful political and governmental institution if it had only the three preceding sets of powers which it shares with the Council on terms so favorable to itself. But the Board has many other powers which it does not share with the Council at all; it is these additional, unshared powers of the Board which make it the paramount city institution.

The additional powers may be discussed in the following five subcategories: (a) financial controls, (b) control of city property, (c) control of franchises, (d) control of city personnel, and (e) control of city planning and zoning. Many of these powers once belonged to, or were shared by, the Council's predecessor institution, the Board of Aldermen, but each of them has now belonged to the Board of Estimate for more than twenty years.

Financial Controls. The Board's preeminent position in the two budget processes and in local laws dealing with finance is supplemented by other powers in financial matters over which the Board has exclusive power, or has power shared only with the Comptroller, or, more rarely, with the Mayor. (The Comptroller and the Mayor always have their four votes each as members of the 22-vote Board; the reference here is to their separate powers in their own respective offices.) The most extensive and important of the financial powers is the authority of the Board to alter the expense budget during the fiscal year by transferring moneys from one major appropriation to another, and to authorize the Director of the Budget, subject to the Board's approval and upon an agency head's request, to transfer funds from one

budget line to another. These powers are so frequently and extensively exercised that the Board substantially remakes the budget during the year. The Mayor introduces the budget and the Council ratifies it after the Board is finished with its initial transformation of the Mayor's budget, but thereafter the Board (aided by its trusted agent, the Budget Director) is undisputed master of the expense budget's many changes during the fiscal year.

The Board has other significant financial powers: it has the power and duty "to fix the salary of every officer or person whose compensation is paid from the city treasury" except as otherwise provided by law; to approve the rates to be charged for water, wharfage, parking, lease of city property; to regulate the letting of contracts, to set standard specifications for city purchases, and to regulate the disposal of surplus property and materials. Nor are these all: the Board of Estimate supervises the "assessable improvements" system of the city, the Board's Chief Engineer approving those costing less than $10,000, the Board itself acting upon all other proposals of Local Improvement Boards in each Borough or taking the initiative itself.

The cumulative fiscal controls of the Board of Estimate are so inclusive and so central that the Board in this field of the political contest overshadows both the Council and the Mayor; only the Comptroller could give the Board significant competition in financial matters, and he is usually a member of the Board's "inner circle."

Control of City Property. "No real property and no interest thereon may be acquired by the city," declares the charter, "and no real property of the city may be sold, leased, exchanged or otherwise disposed of except with the approval of the board of estimate and as may be provided by law unless such power is expressly vested by law in another agency." In addition to this control over the acquisition and disposal of city property, the Board has control over the use of city property, having the power with the Mayor's approval "to assign to use for any public purposes any city property, for whatsoever purpose originally acquired, which it may find to be no longer required for such purpose and may assign space in any city building to any agency."

Control of Franchises. The power to grant franchises once belonged to the Board of Aldermen, but in 1905 it was transferred to the then existing Board of Estimate and Apportionment. The charter now provides that: "The board of estimate shall have the control of the streets of the city, except as in this charter otherwise provided, and shall have the exclusive power in behalf of the city to grant franchises or rights or make contracts providing for or involving the occupation or use of any of the streets of the city, whether on, under or over the surface thereof, for railroads, pipe or other conduits or ways or otherwise for the transportation of persons or property or the transmission of gas, electricity, steam, light, heat or power, or the installation of trans-

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former vaults, and to give the consent of the city to any franchise or right of any kind or nature whatsoever for or relating to the occupation or use of the streets of the city under the provisions of the constitution or of any statute."

To this control over franchises by the Board is added its control over "revocable consents." The charter provides that: "Consent to construct and use for private use pipes, conduits and tunnels under, railroad tracks upon, and connecting bridges over any of the streets of the city shall be by resolution of the board of estimate . . . revocable at any time by resolution of the board of estimate. . . ."

The resolutions of the Board with respect both to franchises and to revocable consents require "the separate and additional approval" of the Mayor, a provision which gives the Mayor one of his rare veto opportunities in dealing with the Board—and this particular veto is of course an absolute veto.

Control of City Personnel. The Board of Estimate, in addition to the control over compensation noted above under the Board's financial controls, has other personnel controls. "The board of estimate may at any time," says the charter, "subject to the provisions of this charter and of the civil service law and except as otherwise provided by statute, create, abolish or modify positions and grades of persons paid from the city treasury." In 1954 a new and ambiguous provision was added to the charter, giving to the newly established Director of Personnel the power "to develop salary and wage plans and standard rules governing working conditions, vacations and leaves in agencies of the city for submission to the mayor, the board of estimate, the civil service commission, the city administrator and the budget director." The Personnel Director and the Budget Director have since acted upon the assumption that this new section, when read in the context of other Board powers, requires the approval of the Board of Estimate for all such plans and rules. The Board also has another personnel power of great importance; it is "the head of the New York City employees' retirement system" and in this capacity, subject to other provisions of law, has the power to "establish rules and regulations for the administration and transaction of the business of the system and for the control of its funds."

These personnel powers of the Board are not so inclusive as the powers it wields in finance, in property, or in franchises—largely because the state Civil Service Law controls so much of personnel management—but the Board's personnel powers nevertheless exceed those of the Mayor, and, of course, greatly overshadow those of the Council.

Control Over City Planning and Zoning. From 1916 to 1938, the Board of Estimate and Apportionment exercised the powers of zoning and other planning functions, still earlier a prerogative of the Board of Aldermen. The establishment of the City Planning Commission in 1938 reduced the powers of the Board of Estimate in zoning and planning by requiring the Board to

act by a three-fourths vote in setting aside any provision of the master plan or of the zoning regulations adopted by the Planning Commission. The Board has not lost its commanding position, however, the Planning Commission having as yet failed to develop either a comprehensive master plan or a comprehensive new zoning ordinance.

These five types of powers exercised by the Board of Estimate without participation by the Council—financial, property, franchise, personnel, planning—make the Board the central institution in the city's political contest, especially when they are combined with the powers which the Board shares with the Council, on the favorable terms which the Board enjoys through its influence over the Council. But the Board has still other powers and advantages in its relationship to other participants in the political contest.

The Board's "Residual" Powers. The charter declares: "The board of estimate, subject to this charter, shall exercise all the powers vested in the city except as otherwise provided by law." The Board is thus heir to all the powers vested generally in the city unless the power is clearly lodged by law in some other agency. In all cases of ambiguity, the Board has the strongest claim to jurisdiction, a claim which before 1938 could be asserted by the Board of Aldermen. The clause has not seen much formal use, but its psychological uses are considerable and its very ambiguity serves to expand the Board's strategic opportunities.

The Board and the Mayor's Veto. Most of the powers exercised by the Board of Estimate are beyond the reach of the Mayor's veto powers. He may veto local laws after their passage by the Council and by the Board. If he does veto such a local law, only the Council, by a two-thirds vote of all councilmen, may override it (the Board having no further part in the proceedings). The Mayor also has an absolute veto over two types of resolutions by the Board: those dealing with franchises and revocable consents and those assigning city property to a new use.

In all its other powers, the Board is confronted by no threat of a veto. The Mayor may cast his four votes on a resolution, but he may not exercise the usual prerogative of a chief executive by entering a veto. The Board having acted, the Mayor's signature is not needed. Considering the range of these Board powers exempt from chief executive veto, the advantage to the Board is substantial.

The formal powers of the Board of Estimate—those shared with the Council plus those exercised independently of the Council, plus the Board's residual powers, plus its freedom in most areas from the Mayor's veto—make the Board a formidable institution. In the distribution of the stakes of the city's politics, the Board has only one close competitor for preeminence—the mayoralty—and in this competition the Board has important resources in addition to its great array of formal powers.

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The Board's Membership

One of the Board's greatest assets is the nature of its membership. Its eight members, the most prominent elected officials in the city, are each elected to and held primarily responsible for their performance in, another office. That is, all membership in the Board of Estimate is *ex officio;* no one is elected directly to the Board. Each member thus brings to the Board not merely his allotted number of votes (four each for the Mayor, the Comptroller, the President of the Council; two each for the five Borough Presidents), but also the power, the facilities, and the prestige of his own separate office.

The member's role in his own office is the one he emphasizes to his electoral constituency; his role in the Board is largely reserved for the low-visibility bargaining which the Board's procedures enhance. The Board as a formal institution is highly visible, especially in its biweekly public meetings, but its decision-making process is one of quite low visibility. Its members thus enjoy the exercise of power in its proceedings without the penalties of individual responsibility; for all the members except the Mayor, who cannot ordinarily obscure the nature of his role in the Board, this opportunity to exercise power without the costs of direct responsibility is a cherished asset.

The Mayor. As chairman of the Board (when he personally attends) and as the official upon whom the widest public expectations are focused, the Mayor is the most visible and prominent member of the Board, but he is rarely its master. The great political and governmental powers of the mayoralty (to be discussed in the following chapter) represent the major institutional rival of the Board in the city's political contest, but as a member of the Board the Mayor is operating on his rival's home ground, mainly under rules and customs devised by the Board itself. The Mayor, by his very membership and by his participation in the Board's executive session deliberations, is inhibited in his other strategies, for he is thus ordinarily shorn of his capacity as elected chief executive to appeal from the Board to his own broader constituency. The Mayor's membership on the Board is an asset to the Board, a liability to the Mayor.

The President of the Council. This office, like that of Vice-President of the United States and of Lieutenant Governor in the state, is one of ambiguity and inhibited anticipation. In itself, the office is the purely formal one of presiding officer over an institution of secondary importance; it acquires its major importance from its incumbent's four votes on the Board of Estimate, but this role has its dilemmas; the real importance of the office lies in the chance that the President of the Council may become the Mayor by succession or election. This chance became reality for Mitchel and Impellitteri; McClellan, La Guardia, Morris, and Halley all held the office before their nominations for Mayor.

As a member of the Board, the President of the Council brings to its bargaining processes the fewest assets of any of the members. His staff is small, far from matching the staffs which bring to other members the information and advice that equip them with bargaining power; his opportunities to appeal to a broad and distinctive constituency of his own are limited; his efforts to carve out a function for himself invariably tread upon the jurisdictional toes of powerful rivals. To exercise influence beyond the weight of his four votes—indeed to give them any significance—the President of the Council is faced with a perennial dilemma: whether to join his fortunes with the Mayor, or to move toward the orbit of the Comptroller and the Borough Presidents. Each alliance has its risks for an official who has few resources for defense against others.

The Comptroller. This official is the potential giant of the Board. His formal powers in his own office do not match the Mayor's, but they are solid powers of great importance and they fit comfortably into the powers of the Board as an institution. As a member of the Board, the Comptroller's substantial official powers serve as a magnet to draw around him the rivalries toward the Mayor felt by the other members, and thus to make the Comptroller the focus and the guardian of the Board as an institutional rival to the Mayor. In the degree to which the Board of Estimate is comparable to the United States Senate as a "citadel" or "club," the Comptroller is the central member of the "club."

The Comptroller, not the Mayor, is the city's chief financial officer. He combines in his fiscal powers most of those exercised at the national level by the Secretary of the Treasury, the Comptroller General, the Council of Economic Advisers, and some others. His advice is directed, not to the Mayor, toward whom he has no charter responsibilities, but to the Board of Estimate primarily, to other agencies in some instances, and often to the Comptroller's own public constituency. A brief recital of his powers demonstrates their substance and their scope.

The Comptroller is authorized by the charter to "advise the board of estimate on the financial conditions of the city or any phase thereof and make such recommendations, comments and criticisms in regard to the operations, fiscal policies and financial transactions of the city as he may deem advisable in the public interest"; "to investigate all matters relating to or affecting the finances of the city" with the power of subpoena and taking testimony under oath; the "power and . . . duty to audit all vouchers before payment and prepare warrants, to audit all official accounts and to audit annually the accrual and collection of all revenues and receipts and to prescribe methods of recording, reporting and accounting in the several agencies"; "to settle and adjust all claims in favor of or against the city"; "administer and manage the several sinking funds of the city and all other trust funds held by the city";

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"keep the accounts of the city"; publish annually "a full and detailed statement of the receipts and expenditures of the city and the cash balance or surplus at the end of the year, the different sources of city revenue and the amount received from each, the several appropriations made, the objects for which they were made and the amounts of moneys expended under each, the money borrowed on the credit of the city, the amount of each loan, the authority under which it was made and the terms on which it was obtained." These are substantial powers of financial administration in any government, but the Comptroller's powers do not end here.

Four times during each year the Comptroller has an opportunity to issue formal statements of great public and political importance—one designed to influence the size and nature of the expense budget, one to influence the tax rate on real property, one to influence the city's debt policy, and a fourth to influence the size and content of the capital budget. These messages are issued, with ceremony and emphasis, from the Comptroller's office on the fifth floor of the Municipal Building, after careful attention not only to the requirements of the charter and the city's finances but also to the political role of the Comptroller in the city government. These reports of the Comptroller provide varying strategic and tactical opportunities—sometimes to lecture the Mayor, often to woo the banking and real estate constituencies of the Comptroller, usually to pose before the communication media as financial statesman.

The first of these messages flows from the charter requirement that "not later than the fifteenth day of February in each year, the comptroller shall submit to the board of estimate . . . a certified statement . . . which shall contain," among other things, an estimate of receipts for the coming fiscal year from all sources except real estate taxes, a statement of tax collections and the tax deficiency account, the condition of the several city funds and the requirements of debt service. This statement sets the stage for the Budget Director and the Mayor in their preparation of the executive budget. The Comptroller may be pessimistic or optimistic, according to his mood, or strategy, or judgment; his predictions control the range of discretion for all the decision-makers in the budget process.

The second message comes from the charter provision that "the comptroller shall prepare and submit to the council, between the fifteenth and twentieth days of June, a statement setting forth the amount of the budget as fixed for the ensuing fiscal year and also an estimate of the probable amount of receipts into the city treasury . . . from all the sources of revenue of the general fund." These two figures (and the Comptroller has great discretion in estimating the second) control the Council, when the total assessment of real property is reported by the President of the Tax Commission, in fixing the real estate tax rate. The Comptroller may, when he wishes, anticipate the

June date of the charter by issuing his first estimates as early as mid-April, as he did in 1957 with the good news of a tax reduction which the Mayor no doubt would himself have enjoyed announcing.

The Comptroller's third opportunity arises out of the charter's injunction that "not later than the fifteenth day of August in each year, the comptroller shall submit . . . a report . . . setting forth the amount and nature of all obligations authorized on account of each pending capital project, the liabilities incurred for each project outstanding on the first day of July and setting forth and commenting in detail upon the city's financial condition and advising as to the maximum amount and nature of debt which in his opinion the city may soundly incur for capital projects. . . ." The Comptroller usually chooses to play a jeremiad role on this occasion, lecturing all upon the virtues of economy, reassuring the banking, lending, and tax-paying constituencies with his doctrines of economy and stability. The size of the capital budget is largely determined by the Comptroller's optimistic or pessimistic mood in this message.

The fourth message rests upon the charter requirement that "not later than the fifteenth day of November, the comptroller shall submit to the board of estimate . . . a report . . . containing such comments and recommendations with respect to the proposed capital budget and program as he may deem advisable." The Comptroller usually deems it advisable to urge economy, to select priorities suited to his own preferences, and to emphasize his alertness and that of his office to the austere requirements of sound city finances. The Board of Estimate's choices among capital projects is greatly influenced by the Comptroller's mood and preferences in this message.

No other city official has such timely and carefully staged opportunities to influence fiscal policy as these four messages provide to the Comptroller. But the Comptroller has still other assets as a participant in the Board of Estimate.

He may authorize the expenditure of moneys from the capital accrual and the real property funds, has custody of the securities in the four sinking funds of the city and determines the investment of their moneys, approves payments to Borough Presidents for their expenses in assessable improvements, settles claims for assessments, inspects and accepts or rejects all deliveries of supplies, materials, or equipment for the city, with the Mayor and Treasurer (by majority vote) selects the banks or trust companies in which all moneys of the city are to be deposited and fixes the rate of interest these institutions must agree to pay in order to qualify as depositaries, and supervises the collection of the excise taxes of the city.

The Comptroller brings to the Board the power and prestige of the city's chief financial officer and of an official elected by a citywide electoral constituency. He can also, and usually does, draw to his support the real estate and banking groups of the city. All these assets make him an object of constant

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public attention, exceeded only by the attention-drawing capacities of the Mayor and matched only by those of Commissioner Moses and the Police Commissioner. His formal powers and his public status combine to make him the pivot of the Board of Estimate, especially in that institution's rivalry with the Mayor. The upper limits of his opportunities are also clear. No comptroller has ever been nominated for the mayoralty nor has any ever held a higher elective office afterward.

The Borough Presidents. These offices were once, a half century or less ago, important administrative establishments. Successive charter amendments and revisions have transferred one after another of their former functions to centralized city departments under the Mayor. The Borough Presidents now are primarily significant as members of the Board of Estimate rather than as heads of administrative activities at the five Borough Halls.

The Borough Presidents retain some important administrative functions, primarily relating to the building and maintenance of the boroughs' local streets, roads, bridges, and tunnels, regulating certain uses of the streets, and control of borough sewers and drainage systems. That is, each Borough President heads his borough's public works activities; but these are steadily reduced in significance as borough streets become arterial highways, as the bridges and tunnels are made parts of larger systems, and other agencies (for example, the public authorities) build parkways and expressways across their boroughs. The Borough Presidents would be minor officials if they were no more than the heads of their respective administrative domains.

It is in the Board of Estimate as representatives of the boroughs (coterminous with the counties, around which the political parties shape their organizations), that the Borough Presidents achieve their importance as officials. Each speaks for his borough, and behind him perceptive observers (other members of the Board, especially) can usually see the strength of his County Leader, or at least a group of Assembly District Leaders, as well as a borough constituency of uncertain but tangible dimensions.

The Borough Presidents bring to the Board neither the impressive formal powers of the Mayor or of the Comptroller, nor the ambiguous potential of the President of the Council; instead, each Borough President brings to the Board a consciousness that he represents a county party organization with which (unless he is a Fusion official) he ordinarily has close ties, and that he has the formal capacity to claim that he speaks, as no other member of the Board can, for the special interests of his borough. These are claims difficult to dispute, risky to ignore. Moreover, the Borough Presidents sense their common cause as a group in the Board, maintain together a practice of "borough courtesy" which they often succeed in persuading the citywide members to observe, while in addition they seek to join with the Comptroller in a bargaining alliance which can guide the Board in the majority of its decisions. These

tendencies are less pronounced, less regular in pattern, but present nevertheless, in a Fusion administration because the relationship between Borough Presidents and County Leaders is then less stable or even nonexistent.

Six of the eight members of the Board add important assets to the Board as a political and governmental institution. The Comptroller and the Borough Presidents find that strengthening the Board is also a way of strengthening their own offices. The Mayor, on the other hand, contributes to the Board's strength mainly by subtracting or surrendering some of the separate assets of the mayoralty. The President of the Council, with four votes as his only lever, is most often neither an asset nor a liability to the Board.

The Board thus adds to its impressive formal powers the great strength of its members individually and collectively, and to these two assets it also adds a third: the aptness of its procedures to the conservation and enhancement of its influence as a participant in the city's political contest.

The Board's Procedures

The charter imposes only a few simple procedural restrictions upon the Board of Estimate. There are several requirements for a two-thirds or three-fourths majority and a few requiring unanimous action, but most acts may be "by resolution adopted by a majority of the whole number of votes authorized to be cast by all the members of the board"; that is, by 12 votes out of 22. The charter further provides that "no resolution or amendment of any resolution shall be passed at the same meeting at which it is originally presented unless by a three-fourths vote or shall be finally passed except at a meeting open to the public." A quorum of the Board is defined by the charter as "a sufficient number of members thereof to cast 12 votes, including at least two of the members authorized to cast four votes each." The first meeting of the Board each year is called by notice from the Mayor; thereafter, the Board itself determines its own schedule. The Mayor, or in his absence the President of the Council, presides at all meetings. The Board must keep a journal of each meeting, which is a public record, and a full stenographic record of all public meetings must be kept on file also as a public record, a transcript being available to "any taxpayer" on payment of "reasonable fees." Except for these charter requirements, the Board "may adopt rules for the conduct of its proceedings not inconsistent with the provisions of law, and such rules shall not be suspended at any meeting except by affirmative vote of two-thirds of the votes which all members present are entitled to cast."

Committees of the Board. The Board of Estimate chooses not to make much use of committees. In its earlier history, the Board had almost a score of standing committees and many special committees in addition, but these were gradually abandoned in the 1920's. Today only two standing commit-

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tees remain: the Committee of the Whole, and the Committee on the Acquisition and Disposition of City Property (composed of the Mayor, the Comptroller, and the President of the Council). The use of special committees has almost disappeared.

Although any such small body would find limited use for committees, the Board also finds little use for committees because it wishes to avoid any public revelation of division within its membership. Committee action, with its prospects of majority and minority reports, and the further possibilities of Board rejection or division, would cut across the strong institutional drive of the Board to achieve unanimity in all its public proceedings.

Bureaus of the Board. The Board of Estimate has found a substitute for committees in its staff bureaus. Of these there are four: the Bureau of the Secretary, the Bureau of Franchises, the Bureau of Engineering, and the Bureau of Retirement and Pensions. The Board also tends to regard the Bureau of the Budget, the City Planning Commission, and, to a growing extent, the Department of Personnel, as staff agencies of the Board. To these seven bureaus (especially to its own four and to the Bureau of the Budget) the Board refers the great bulk of those matters which it once referred to committees of its own members.

This use of well-staffed bureaus has many advantages for the Board as an institution. It provides the Board with expert information and advice; it helps to make the workload of the Board manageable; it gives the members of the Board the time, and perhaps even the alternatives, for the bargaining which is the Board's essential *modus vivendi*. Even more important to the Board is the fact that the bureaus in their work and their reports do not threaten the collective unity of the Board in its public decisions. The members need not commit themselves prematurely; when the bureaus do report, the Board still has time, if more time be needed, to bargain out a formula for unanimity.

No Public Debate. The Board of Estimate is further aided in its search for a public show of unanimity by its tradition of listening to others in its public meetings but avoiding debate among its own membership. In its biweekly public meetings the eight members of the Board sit *en bloc* on a raised dais, facing their audience and the speakers who wish to address them. The Board's public proceedings thus resemble in part the public hearing of a legislative committee—but without some of the substantial characteristics of such a hearing (for example, the purposeful interrogation of witnesses, the analytical development of issues and alternatives). The members of the Board may listen without comment, they may encourage or heckle the speakers, they may twit or praise each other, or they may make relevant or irrelevant declarations from time to time.

Whatever the variations in member behavior, no systematic presentation, defense, or criticism of proposed public policy emerges from participation in

the discussion by the members of the Board themselves. The accepted fine art of Board behavior is to listen, to question, to display knowledge and alertness—but to avoid commitment either in sustained debate or in explicit declaration of policy.

This protocol of Board behavior is not infrequently breached by intransigent members only partially committed to the Board's values and traditions of sacrificing public debate to private bargaining, but these occasions produce bickering rather than a structured discussion of the issues. The procedures of the Board are not designed, and in fact make it almost impossible, for the members to oppose each other in the form of legislative debate: the calendar is long, the speakers' list is often extensive, the expectations of the audience are for a public hearing, not a Board debate—and the Board would not wish any of these arrangements to be otherwise.

Uses of Postponement. If the Board of Estimate is not a publicly deliberative body, it is nevertheless a deliberate one. It does not engage in a final public vote until all the avenues to unanimity have been patiently explored. On most matters its rules ensure against precipitate tests of Board unity; an item on first appearance is typically referred to a bureau of the Board or to the Budget Director. (It is a matter of some significance that the greatest number of referrals from, and reports to, the Board involve the Budget Director.) If an item returns to the calendar before agreement has been worked out within the Board, or if unanticipated public opposition appears, the offending item may be laid over until a later meeting, and this process may be repeated, if necessary, until the effort to find a formula, or an occasion, for unanimity has been successful.

Postponement does not often embarrass the Board. Its calendar contains so many items that to "lay over" or "refer" one fourth to one half of the items is a practice taken for granted by all participants and observers. Subterfuge is not involved; the postponed item must eventually come back to the public calendar or die in the files. No habit of the Board is so deeply imbedded, and so rarely challenged, as is its practice of delay.

Ad Hoc Decisions; Minimum Delegation. The Board of Estimate uses legislation sparingly; in fact, it ordinarily succumbs to the enactment of general rules, under which others may exercise discretion, only when local laws are before it. In the exercise of all its own powers, the Board makes no general rules, delegates no final authority, but instead requires each successive instance to come before it for Board action. When it does vary from this code of behavior, an infrequent aberration, it is more likely to do so for the Comptroller or the Budget Director than for the Mayor or any of his agencies.

The Board thus conserves its powers as an institution, and as a participant in the city's political contest, by requiring that every separate decision within the reach of its broad jurisdiction shall come before it for final action. This

practice confronts the Board at each meeting with a calendar of from 200 to 600 separate items, totaling during the year as many as 15,000 calendar items, of which perhaps half are nonduplicating. Nor is this a new phenomenon; in 1928, the Board disposed of 12,000 items.

The Board reveals no disposition to change this practice of avoiding delegation to others under legislation or general rules enacted by the Board. To modify this pattern would reduce the political and governmental powers of the Board, while increasing those of the Mayor and of the agencies more responsive to his direction. If it is to hold and enhance its role as a participant in the city's political contest, the Board as an institution must retain its detailed, specific decision-making opportunities even though these practices carry the Board deep into the territory usually regarded as the prerogative of the chief executive and the administrative agencies under his supervision.

Executive Sessions of the Board. The key to the Board's procedural system are its "executive sessions," formally the meeting of its committee of the whole, to which a day or more is devoted by the Board shortly preceding the day of its public meeting. The sparse use of committees, the use of bureaus as substitutes for committees, the tactics of postponement, and the avoidance of general legislation—all these depend for their effectiveness upon their culmination in the executive session, where the Board finds the optimum conditions for its special role in the city's political contest.

The executive session of the Board meets to consider a calendar of items virtually identical with those which will concern it a day or two later in its public session. But now the Board meets behind closed doors, in the presence of its own members, their selected assistants, and such other public officials as may have been invited by the Board. There is no record of proceedings; all is informal and confidential. The Board's bureau chiefs and the ubiquitous Budget Director do most of the briefing of Board members on particular items. The members of the Board then disclose their initial sentiments. On many familiar items there is a quick establishment of unanimity, frequently aided by the bureaus' capacity to anticipate the formula which will unify the Board. When agreement proves difficult, the Board will usually clear the room of all nonmembers and then proceed to a bargained adjustment of their differences or to an agreement to delay. When the day's executive session is concluded, the Board knows which items will be on its public calendar for action that week and which will be held back for further negotiation; it knows which items will be unanimously enacted, or the extent and nature of any unavoidable dissent by members in public; it knows which items on the public calendar will be "laid over" for a future public meeting, and which items will be referred to whom for "further study."

The blueprint of Board behavior at the next public meeting is thus laid out in detail, and it is understood that each Board member is by his participation in the executive session now fully committed to its agreements. Only the rare

event of a strong, unanticipated public reaction at the public meeting, or in the communication media, will upset the Board's predetermined course of action—and for that eventuality, the Board also has a settled formula: the item will be laid over. Another executive session of the Board will subsequently dispose of it in terms suited to the Board's carefully considered reappraisal of the bargain earlier arrived at.

It is in its executive sessions that the Board reaches the peak of its strength and genius as a political and governmental institution. It is here that the Board's influence as a participant in the city's political contest is at its highest. For it is in these executive sessions of the Board that the Mayor, with his great separate powers and high public status, is disarmed and humoled and made a prisoner of the Board's cult of unanimity. It is in these executive sessions, too, that the Budget Director is most fully absorbed into the Board's orbit of influence, the City Planning Commission brought to terms preferred by the Board, and other overhead and line agencies made to feel the benefits of alliance with the Board or the penalties of divergence.

The executive session of the Board is in essence a caucus. Those who attend are committed to its private bargaining processes. They are committed also to abide by its decisions except where the members as a matter of grace concede to a particular member his special necessities to record a public dissent, but such a privilege must not be too often claimed, nor can it be exercised in a way to disclose the secrets of the caucus. Those who would like to stay away, and thus remain uncommitted, are faced with the price of being uninformed, of being outside the bargaining process, of being subject in many ways to the sanctions and displeasure of the Board. The consequence has been that, with rare exceptions, all members attend the caucus, accept its rules with only infrequent displays of insurgency, and subscribe increasingly to the caucus objective of private bargaining followed by public unanimity. While the caucus system has its difficulties and variations under a Fusion Board, the net result is less than drastic in its difference.

The Cult of Unanimity. The Board of Estimate as an institution of power and influence in the city's political contest would be most vulnerable in its public meetings if those who guide its destinies had not long been at special pains to maintain the unity of the Board when it meets in public. Its standing and special committees were long ago absorbed into its caucus system, its bureaus have been developed as an aid to unanimity, public debate has been avoided, and the executive session has been refined into an institutional guarantee of public unity. The public meeting of the Board now convenes to confirm, and to give legitimate effect to, the decisions earlier made in full detail in the executive session.

The outcome is an institutional miracle. Some public meetings of the Board, with more than 300 separate items (often with more than 500), will record not a single dissenting or abstaining vote. Others will reveal a single

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item on which a dissent is registered, while dissent on as many as five items is extraordinary. In 12 meetings selected at random during 1955, with calendar items for the 12 meetings amounting to 4,958, only 11 "split votes" were recorded—3,141 being unanimous, the remainder "laid over," referred, or filed. Even when the "routine" nature of many items (themselves an index of detailed Board control) and the disposition of small, intimate bodies to be unanimous in public votes are both taken into account, the Board's unanimity is impressive and unusual. The temptations of the members to use the powers and opportunities of their separate offices, to appeal to their own public constituencies, have obviously been curbed. Even the Mayor must usually sit mute, committed to the bargains of the executive session, bargains purchased most often at the price of mayoral concessions to other members of the Board.

The procedural system and traditions of the Board of Estimate reflect an institutional genius for adapting the Board's formal powers and its membership to a pattern of operations which conserves and maximizes the Board's influence as a major participant in the city's political contest. The Board has been successful in absorbing rather than surrendering power, in curbing the powers of the Mayor, its most influential rival in the political contest, and in doing these things so unobtrusively that other participants have found few opportunities to complain.

THE BOARD AND OTHER MAJOR PARTICIPANTS

The Board of Estimate has such extensive powers that it attracts the constant attention of the other important participants in the political contest. We have seen how several of the line agencies are drawn into the Board's orbit, how some of the overhead agencies are absorbed into alliance with the Board, and how several of the organized bureaucracies focus their efforts at influence upon the Board. We have seen also how the Council operates in the Board's shadow, and we shall see in the next chapter that the Mayor is deeply involved with the Board in a rivalry in which the Board has at least a net advantage of position. But two other major participants—the party leaders, and the non-governmental groups—will be discussed here.

The Party Leaders and the Board

The members of the Board of Estimate hold the eight most important elective offices in the city government. Nominations to these offices lie more completely within the influence of the party leaders than that of any other participant in the political contest. Election to these offices involves the efforts of additional participants, but the role of the party leaders is still ordinarily a dominant one. Further, the eight members of the Board usually aspire to renomination and reelection, or else they hope for other and higher posts on the party or governmental career ladder—aspirations which, in

either event, are subject to the important if not conclusive influence of party leaders. The ties between the members of the Board and the party leaders (especially the five County Leaders) in most instances are consequently direct, frequent, and of importance both to the officials and to the party leaders.

The links of a member of the Board with his party organization are almost always closest with the County Leader of the borough in which the member resides. Of these relationships, those between the County Leader and the Borough President are the easiest to work out and to maintain. These two have the same jurisdictional boundaries; their working relationships can be relatively uncomplicated. The three members with citywide constituencies (the Mayor, Comptroller, and President of the Council) have a more difficult pattern to work out. The Comptroller and the President of the Council are usually most closely linked to the County Leader in their respective home boroughs, but they each must also work out some relationship with the other four County Leaders as a way of recognizing the contribution which those leaders made to the official's nomination and election, and the role the leaders will play in future nominating and electing situations. The Mayor has an even more difficult problem; he must seek to deal with all five County Leaders on a plane of equality among them.

Where collective Board of Estimate action is concerned, each County Leader relies most frequently and regularly upon his Borough President. The Borough President is the official spokesman for the borough and county; he is usually more indebted to and dependent upon the County Leader than are the citywide officials; and his lighter official duties make him more accessible to the party leader. The County Leaders also court the Comptroller, both for his own separate powers in finance and for his influence in the Board; his 4 votes, when added to the Borough Presidents' 10, constitute a comfortable majority of the Board's 22. The Comptroller's tendency and capacity to polarize around himself the balance of bargaining power in the Board is an additional attraction to the party leaders, especially on issues where the Mayor is giving them difficulties. The President of the Council is less often an object of attention from the party leaders.

For the Borough Presidents and the Comptroller, the main significance of their relationship to the County Leaders is that it strengthens the hand of the Board against the Mayor. The working alliance has a similar attraction for the party leaders; the Board helps them often to restrain the impetuous tendencies of Mayors who are more responsive to their broad constituencies than to party organization advice. The Board's procedural system makes the working relationships between the party leaders and the Board members an unobtrusive and easy process. Access to the executive session is restricted, the party leaders cannot be present, but they have favored, indirect entry. The

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Board's methods give time, too, for full communication, provide a time and place for bargaining in the Board's executive sessions, and the secrecy of the caucus surrounds the party leaders' intervention through the Borough Presidents or other members. For all the official and party participants except the Mayor (and perhaps on occasion the President of the Council), the pattern is one of optimum arrangements: maximum exercise of influence with minimum risk of accountability.

Nongovernmental Groups and the Board

The public meetings of the Board of Estimate are the great gathering place of the nongovernmental participants in the city's political contest. They come by the hundreds, perhaps even thousands, during the year—by scores to a major budget session, in considerable number to other meetings, and the Board is rarely confronted by an audience with no representative present, able and anxious to speak. Their leaders come to support or object to an item, to lecture or cajole, to threaten or to plead, to praise or to criticize. Often their fire is aimed as much at each other as at the noncommittal members of the Board. They come mainly because no other forum in the city matches, for their purposes, the forum provided by the Board in its regular schedule of meetings, the presence of high officialdom, the focus of the communication media, the attendance of allies and competitors.

Some nongovernmental groups give specialized attention to particular parts of the Board's agenda; others watch over the whole calendar of the Board. Some appear infrequently; others are in almost constant attendance. The budget sessions bring out almost all of them. Some address the Board as strangers, some on the basis of long and close acquaintance. Toward some the Board is friendly, tolerant, even indulgent; towards others it is aloof, occasionally biting. On the whole, the Board enjoys its role in the sun of public attention, treating its speakers and its audience as valued assets. Seldom is such prominence for all the participants (Board members and speakers alike) purchased at similar bargain rates.

The consequences of these repeated appearances of many groups before the most prominent and the central public forum of the city government are not easy to assess, or even to identify. The most pervasive result is a widespread sense of participation; no group is alienated from the city's political process when its leaders can speak directly to the city's most prominent officials, in the presence of the representatives of other groups of the highest prestige. For the leaders and members of these groups, there is a valued opportunity to be informed by others, to become a part of an informed electorate, however briefly on however narrow an issue. For the leaders of the nongovernmental groups, there is also the more tangible reward of demonstrating to the group's own membership the worth of the association and the alertness of the leaders

of the group to the issues which concern the membership. There is a related chance to recruit new members and new contributors for the group by a show of wisdom, information, or eloquence. For some there is the added satisfaction of a fight for the public interest. All this takes place before the eyes of an attentive corps of newspaper reporters who will give prominence to the events.

The more experienced among the nongovernmental representatives appearing before the Board know the odds against a substantial exercise of influence over the Board's immediate actions. They know that the Board's executive session has probably already arrived at a decision, and they understand how unlikely a reversal or modification is. But they know, too, that the opportunities for influence are not altogether absent. An unanticipated common front among the speakers, or the unexpected touching of a sensitive political nerve, may cause the Board to defer action, and action deferred is a new opportunity for influence. Then, too, the experienced representative may be using a present occasion to influence a future item (knowing the Board has sensitive ears for such nuances), or to provide the grounds for influence sooner or later in another place (before the Mayor, in an administrative agency, in the state legislature, in the courts, or in the press).

The Board's public forum is one of its own great assets as an institution and as a participant in the city's political contest. At minimal cost to its procedural system (especially to its private bargaining in its executive session caucus), the Board enlists on its side the affection and support of all the nongovernmental groups who need the stage the Board provides for the performance of their role and who cannot find its equivalent elsewhere in the city government (the Council, even if so disposed, lacks the power to make its public sessions equally significant). For many groups, this stage is deemed to be so essential to their functioning, and it is so difficult for them to imagine a substitute, that they do not examine the price they pay for their periodic appearances. They prize and support the Board as an institution, encourage the expansion of its powers, overlook the realities of the Board's caucus, counting their minutes on the Board's stage as measures of their influence. A few groups understand that the forum is symbolic; they look to other avenues of influence, using the Board's stage for more limited purposes. But so universal is the gratitude of the leaders of the nongovernmental groups to the Board for the use of the Board's public stage, that the Board as an institution is more nearly immune from criticism than is any other participant in the city's political contest.

VARIATIONS UNDER FUSION

When all the members of the Board, or a majority of them, at a given time have been elected on a Fusion ticket (that is, a combination of Repub-

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licans and others in the joint endorsement of a list of negotiated nominations), the Board may undergo some important transformations in its behavior. The executive session caucus may decline somewhat in its importance, the Mayor may gain in leadership opportunities, the Comptroller may be inhibited in his independent role, and the Borough Presidents may have less stable ties to the party leaders. All these possibilities are related to the differences between a majority party (Democratic) city administration and a coalition administration.

First, the recruitment of the Fusion members of the Board is conducted under quite different circumstances and their relationships to each other are different. Fusion nominees for Borough President, Comptroller, President of the Council and Mayor are more likely to have had careers as insurgent, independent, or nonparty leaders. They are likely to have varied and divergent aspirations for their future careers. They are not likely to have known each other long or intimately. They are inclined to be program- or policy-oriented rather than party-oriented. And they tend to be individualistic, resistant to group unity or discipline, and relatively unpredictable in their responses to new issues. They are as likely to be openly competitive with each other as they are to be cohesive in action. The executive session caucus seems to some of them to be an unattractive institution.

Second, the Fusion Board members and the party leaders are not often comfortable collaborators. The Fusion Borough President, for example, must deal not only with the Republican County Leader but also with the leaders who organized his remaining electoral support (often not less than half of his total vote). For the Fusion Comptroller, President of the Council, or Mayor, this problem is multiplied by its ramifications in five counties. The result is that Fusion members of the Board usually maintain a detachment from party leaders not feasible for majority party members of the Board. The Board's caucus is thus often reduced in its effectiveness as a source of public unanimity for the Board, the Comptroller is deprived of some of his opportunities to form and lead a Board majority, and the Mayor may be able either to stand apart from the Board or lead it from within.

Third, Fusion Boards have revealed varying attitudes toward Mayors. In the Low administration (1902–1903) the Board was a new institution, its members just entering upon the search for the boundaries of the Board's power and influence, and so not prepared to test its opportunities fully. In the Gaynor administration (1910–1913) the Fusion Board confronted a majority party Mayor and demonstrated, under the leadership of Mitchel, then President of the Board of Aldermen, that the Board could often control an aggressive and self-willed chief executive. In the Mitchel administration (1914–1917) the Fusion Board and the Fusion Mayor were more compatible, but Mitchel frequently chafed under Board controls. In the three La Guardia

administrations (1934–1945) the Fusion Board majorities and the Fusion Mayor often clashed; the Mayor, by boycotting most of the executive sessions, by appealing to the public against the Board, and by occasionally directing his attacks at a Democratic or a Republican Borough President, managed to lead the Board more often than he was led by it—but in his third term his leadership over the Board was precarious.

All these variations, while having some important consequences for the Board, do not alter the essential characteristics of the Board as the institution at the center of the city's political contest. The Fusion Board is less united in its rivalry with the Mayor, the Mayor is less curbed by the Board, the party leaders have less direct access, but these differences are in degree rather than in kind. The Board survives Fusion administrations unimpaired in its primacy.

DILEMMAS AND CONSEQUENCES

The Board of Estimate is a complex and subtle institution. It is powerful as a Board, wielding great influence over almost all city officials and employees, over most official decisions and actions. As such a center of power, it is an object of pressure and influence from all other participants in the political process, and it is more successfully influenced by some (by the Budget Bureau, its own bureaus, the organized bureaucracies, the party leaders) than by others. As an institution, it is itself a conscious participant in the city's political process, seeking to preserve and enhance its own power as against the rival institutions of the mayoralty and the separate administrative agencies.

But it is also a Board composed of individual members, each of whom is a participant in the city's political process as an individual official. The Board, as an institution, is primarily an instrument for each of them in the pursuit of his own separate goals. The actions of the Board are largely a product of the accommodations each can make with the others in pursuit of these separate goals. As an institution it is thus more an agency of accommodation than of leadership or unity. The consequences of its behavior are significant, but they are not a great contribution to coherence, integration, or innovation in the city's political process.

Four major consequences flow from the nature and strength of Board of Estimate participation in the city's political process. Taken together these four consequences make the Board the single most powerful participant in the distribution of the stakes of city politics.

First, the Board of Estimate has swallowed up the Council's functions. The charter-makers of 1936 described the Council as holding "the legislative power of the city" in one paragraph, but took the substance of that power away in later paragraphs which make the Board of Estimate preeminent.

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The result is that the city government has no genuine legislative process, for while the Board exercises many of the powers of a legislature, it does not function like one. A legislature in formal theory has several distinctive characteristics: it is composed of members of formally equal status and equal vote; its salient proceedings are public; it engages in structured public debate between its members, who are either sponsors or critics of proposed actions or current governmental performance; it has substantial powers which are exercised primarily through statutes of general application. With the swallowing up of the Council by the Board, New York City has no such legislative institution. It has, instead, a caucus of officials, acting *ex officio* as members of the Board of Estimate.

Second, the Board of Estimate has a commanding position within the city government over the city's financial and personnel policies and management. This role the Board has achieved by combining in practice its own formal charter powers with the extensive separate powers of the Comptroller, by using these combined powers to coopt the Budget Director and the Personnel Director into the Board's sphere of operations, and by dealing warily with the City Construction Coordinator (a semiautonomous center of power, of no great comfort to any other official participant). It is the Board of Estimate, not the Mayor, which manages the finances and the personnel of the city government. While the state constitution and state laws sharply limit the discretion of the city government in both finance and personnel, the Board is the master of such discretion as the city enjoys. The Mayor and his administrative agencies, and the service-demanding nongovernmental groups, may propose new programs or suggest modifications of existing ones; the Board centers its interest upon the minutiae of the city's finances and upon the ways in which proposed changes affect the fortunes of the city's bureaucracies. The preoccupation of the Board with finances recruits for the Board some cautious support from the revenue-providing interest groups, especially when the latter are alarmed by the Mayor's sympathetic responses to his service-demanding (and thus money-spending) constituencies. The Board also benefits by the gravitation of the city's organized bureaucracies toward the change-resisting Board and away from the innovating tendencies of the Mayor and some of his commissioners.

Third, the Board of Estimate is a major conservative force in the city's political contest. The Board, like the party leaders and the bureaucracies, has an affinity for the *status quo*. Its dominant characteristic is its capacity to absorb, as if it were a great sponge, the constant stream of proposals for change which flow in upon the Board from the Mayor, from the commissioners of departments and agencies, from the nongovernmental groups and the communication media, from all those who would like to be Mayor, and from all the other sources of dynamism in the city. The Board's powers and its procedural system are shaped to resist the unsettling effects of these proposals upon

the equilibrium of forces which the Board as an institution represents: the Board can refer, postpone, or bargain among the many proposals; while others talk about goals and programs, the Board (especially through the Comptroller and the Budget Director) can turn the vocabulary to one of scarce money or to disputed alternatives of jurisdiction for proposed programs. Proposers of change are thus transformed from pressures upon the Board to competitors with each other, while the Board pursues quietly its own inscrutable course, shielded by its caucus, its financial and personnel powers, its tradition of public unanimity, and the symbolic uses of its public forum.

Finally, the Board of Estimate seeks with substantial success to contain the Mayor, holding him to the rules of bargaining and to the commitments of the caucus in the Board's own executive sessions. This development is contrary to the hopes of the charter-makers at the turn of the century and of their successors in 1936. Their assumption was that the Board would be led by the votes of the "big three" (the Mayor, the Comptroller, and the President of the Council), that these three citywide officials would act together, and that the Mayor would lead them—thus blanketing the votes of the five Borough Presidents. This was wishful thinking in 1901, discounting as it did the nature of the city's party system, the relationships of County Leaders to Borough Presidents, and the evident tendencies of the Comptroller toward competition with the Mayor. In 1936, the theory had been so clearly refuted by a generation of Board history that the Charter Commission action can be explained only as a higher form of innocence or as a subtle vote of confidence in continued Board supremacy over the Mayor.

The reality is that the Board is not often led by the Mayor; instead, it unites against him if necessary, absorbs him into the Board as a member without special status if it can. Only twice in six decades can the Mayor be said to have called the tune for the Board: for a while under Mitchel, for a little longer under La Guardia—but for neither did the role of Board leadership span the Mayor's full tenure in office. The Mayor, even a Mitchel or a La Guardia, cannot lead the Board for long because he has no effective sanctions against the Board. He has no general veto over its actions; only La Guardia found it possible to stay away from the Board's caucus. Once he enters it he is not only shorn of his greatest strength (his capacity to invoke in broad public appeals the symbol and reality of his office as representing all the people of the city), but he is also committed to endure silently the agreements reached in the caucus whose rules of the game bind him as much as any other member. The Mayor ordinarily cannot even single out for special sanctions his rivals in the Board; these rivals are protected not only by the anonymity of the caucus and by the unanimity of the Board in public but also by the necessities of party unity emphasized by all the power of the County Leaders in the party.

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The Board of Estimate may be said to be composed of the Mayor and of seven other members who would have liked to be Mayor, or who hope soon to be Mayor, or who had preferences for Mayor other than the incumbent. These feelings are usually held most strongly by the Comptroller and the President of the Council. The Borough Presidents share them too, however, and have additional imperatives for regarding the Mayor as a rival. When to these sentiments, aspirations, and necessities are added the special powers of the Comptroller as chief financial officer, with their built-in rivalry to the Mayor, the most natural and logical (indeed the almost inescapable) majority alliance within the Board is not one among the "big three" but between the Comptroller and the five Borough Presidents. Their combined 14 votes are the core of the Board as an institution—the President of the Council may move back and forth across the line, pulled by the Mayor in one instance and by a County Leader in another (or even striking out on his own), and a Borough President may be lost now and then from the caucus majority; but the prevailing bargains are most often struck by the Comptroller and his five Borough President associates.

Of the three most important central institutions of the city government (the Council, the Board of Estimate, the mayoralty), it is the Board of Estimate which has most fully realized its own expectations as a participant in the city's political contest. The Council has disappointed even its least hopeful members. And the Mayor, as the city's elected chief executive and the most prominent participant in its political contest, would have been more fortunate if he could have exchanged his membership and his four votes on the Board for a separate existence as elected chief executive. As a member of the Board and a reluctant guest in its caucus he is less the elected chief executive of the city than the Board's hostage. On the chessboard of the city's politics, the Mayor may be king, but the Board of Estimate is queen.

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Most of the important business done by the city—budgets, franchises, important local laws, and so forth—are recorded in these pages.

Exhibit (7): Annexed to the Appendix to Plaintiffs' Memorandum of Law Submitted to the United States District Court Eastern District of New York

New York City Charter Revision Commission for New York City,

***Borough Government Report* (1973), pp. i-55**

STATE CHARTER REVISION COMMISSION
FOR NEW YORK CITY
270 Broadway
New York, N.Y. 10007

To: B. Bottger
E. Robin
S. Clifford
D. Seiden
J. Carberry
W. B. Richland
G. Hallett
S. Silverman

From: Dennis Allee 11 September 1973

BOROUGH GOVERNMENT REPORT

Attached for review and comment is the first draft of the Borough Government report. Written comments should be prepared for a meeting which will be held on Friday, September 21st, at a time yet to be designated.

DA/jmt
Attachment

Exhibit 7 Annexed to the Appendix to Plaintiffs' Memorandum of Law

CHARTER REVISION COMMISSION FOR THE CITY OF NEW YORK

BOROUGH GOVERNMENT REPORT

NEW YORK STATE LEGISLATIVE INSTITUTE

THE BARUCH COLLEGE OF THE CITY UNIVERSITY OF NEW YORK

September 1973

Exhibit 7 Annexed to the Appendix to Plaintiffs' Memorandum of Law

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Introduction

The objectives of this study are as follows: *first,* to describe the present and historical role of borough government; *second,* to identify the main conceptual issues underlying possible changes in the present role of borough government; and *third,* to describe and analyze principal charter options for the future role of borough government.

The scope of this study is extremely broad. It covers virtually the entire range of Charter options available to the Commission. Thus it is essential to provide a borough focus which works towards achieving the objectives set forth above without duplicating studies in areas such as planning, budgeting and service delivery which the Commission has undertaken.

Any borough decentralization plan involves the transfer of specific powers over designated governmental functions from the city-wide to the borough level. Accordingly, the basic organizing principle for this study involves:

1. the identification of those functions that might be regarded as principal candidates for borough decentralization;
2. a description of the key powers required to control or substantially influence the exercise of these functions; and
3. illustrative models representing successively greater degrees of power transferred to borough government.

Specifically, the study is divided into two parts. Part I lays the foundation for consideration of specific decentralization models by presenting:

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Ch. I: descriptive information regarding the historical role of borough government, including a description of those functions once controlled by borough government;

Ch. II: the present role of the borough president;

Ch. III: a general discussion of how that role might be affected by the transfer of additional powers to the borough level; and the key conceptual issues such as size, race and politics that must be considered with respect to any borough decentralization plan.

Part I then continues with the presentation of a detailed set or options designed to "fill out" a borough government structure (Ch. I). That is, a structure that would encompass more than the office of Borough President. At present, the borough president is virtually synonymous with borough government, there being no meaningful powers vested in any other unit of borough government. Should the Commission decide to transfer significant powers to the borough level, these options might be considered in determining the appropriate locus of borough powers.

Part II begins (Chs. V and VI) by describing specific options for transferring successively greater degrees of power over the budgeting, planning and service delivery functions to the borough level. These chapters, therefore, describe various strengthened roles that the borough government might play in its relationship to city government.

A fourth role, not fitting neatly into any of the traditional, functional categories mentioned above, is that of borough ombudsman or citizens advocate as we have called

him (Ch. VII). Because it is an important role now played by the borough president, the Commission may decide to strengthen it independent of any decisions that are made with respect to the decentralization of other functions. This chapter similarly presents the potential relationships between citywide and borough government in terms of successively greater degrees of power that might be transferred to the citizens advocate.

Finally, Chapter VIII presents various options (again in terms of successively greater degrees of power that might be vested in borough government) for borough involvement in the event that the Commission determines to transfer meaningful powers to the district level.

The Appendix presents typical county government models, their structure and functional responsibilities as well as their relationship to the political subdivisions contained within them. These models may be useful in thinking about analagous borough government structures.

CHAPTER I

History of Charter Changes in the Office of Borough President

I. *Tracy Commission--(1897)*

The first charter for the consolidated City of New York, effective in 1897, divided the city into five boroughs, each comprised of a county or the cities, towns and villages that had been consolidated into New York City.

The borough of Manhattan was comprised of Manhattan, Governor's, Bedloe, Ellis, Oyster, Blackwell's, Randall's and Ward's Islands.

The borough of Brooklyn was made up of Kings County, that is the city of Brooklyn.

The Bronx was comprised substantially of all of old New York City north of the Harlem River, the city of Yonkers and the towns and villages from Westchester County which were annexed to New York City in 1895.

The borough of Richmond was comprised of Richmond County which consisted of the towns and villages on Staten Island.

The borough of Queens was comprised of Long Island City and the towns from Queens County which were incorporated into New York City pursuant to the affirmative vote of Queens residents on the consolidation referendum held in 1894.

Prior to consolidation, each county, city, town and village was governed under separate charters and local laws. Services in Brooklyn and in New York City were administered on a city-wide basis under central departments; except for the twenty-third and twenty-fourth wards in New York City where certain functions of the city's Department of Public Works were performed by a Commissioner of Street Improvements. In 1890, because the City had failed to map adequately and improve it, the residents of this area secured legislative authority to elect their own commissioner.

The 1897 charter established the Office of Borough President, but gave it few formal powers. Shortly after its enactment, borough political leaders pressured the state legislature and the governor to establish a charter commission for the purpose of examining the question of decentralization of power (primarily with respect to public works) to the borough level.

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II. *Rives Commission—(1901)*

In April, 1900, Governor Roosevelt appointed the Rives Commission to examine the issue of borough-level decentralization. The Commission's findings and recommendations resulted in a substantially strengthened Office of Borough President.

Specifically, the Commission recommended that a Bureau of Buildings be established under each borough president, and that the borough president be given authority to appoint a Borough Superintendent of Buildings to enforce building regulations.

In the area of public works, both those paid for by local assessments and those paid for by the city, the Commission reported that it was "satisfied that the scheme of the present charter . . . proved most unsatisfactory in its workings, more especially with regard to the boroughs other than Manhattan." *

Testimony before the Commission indicated that the administration of services in matters relating to streets and sewers had proven more efficient under the old Commissioner of Street Improvements than under the centralized departments. Thus the Commission recommended that the Departments of Highways and Sewers be abolished and that their construction and maintenance functions be transferred to the borough presidents.

In accordance with the decision to decentralize public works, the new charter also abolished the city-wide Board of Public Improvements. Its local improvement functions were transferred to the twenty-five Local Improvement

* *New York City Charter Revision Report*, 1900, p. 14.

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Boards and the Borough Presidents.* Various public works, formerly controlled by the Board of Public Improvements, were assigned to the borough president. He was authorized, under the charter, to appoint a Commissioner of Public Works for the borough.

The charter conferred substantial administrative powers upon the borough presidents. Table 1-1 presents the specific powers transferred to borough government, most of which the borough presidents retained until enactment of the present charter in 1963.

Approved on January 1, 1902, the new charter made the local improvement districts permanent, with changed boundaries. Each district contained a local improvement board comprised of the borough president and the members of the Board of Aldermen representing any part of the district. The borough president retained his chairmanship of each local improvement board. The boards had authority to hear complaints, pass resolutions regarding matters affecting the general welfare of the district and to recommend the initiation of local improvements.

Under the 1 '7 charter, the boards acted solely in an advisory capacity. Under the 1901 charter, while the boards retained advisory and complaint-hearing functions, they were also given substantial authority over local improvements. If a local board approved a petition from an affected property owner, the borough president was authorized to execute the contract for the work subject to the

* The 1901 charter defined the power of the Local Improvement Board to initiate "improvements in and about . . . streets within its district as the public wants and convenience of the district shall require." Ch. XI, Title 3, section 433 of the New York City Charter, 1901.

approval of the Board of Estimate and Apportionment.* If the cost of the work did not exceed two thousand dollars ($2,000.00), approval from the Board of Estimate and Apportionment was not required. If the improvements imposed upon the city as a whole involved a charge of more than five hundred thousand dollars ($500,000.00), Board of Estimate and Apportionment as well as Board of Aldermen approval was required.

In sum, prior to 1901, the borough president was viewed as a local figurehead, but under the proposed charter revision, he was given nearly all the authority that advocates of decentralized government had argued for in 1897, but

* The Board of Estimate and Apportionment existed in New York City prior to consolidation and was retained in both the 1897 and 1901 charters. In addition to having substantial legislative powers, the Board prepared the city's budget. Prior to 1901 the Board consisted of the Mayor, the Comptroller, the President of the Council, the Corporation Counsel, and the President of the Department of Taxes and Assessments. The 1901 charter gave the Board several new powers and radically changed its composition by adding Borough Presidents and removing all mayoral appointees. The President of the Board of Aldermen was substituted for the President of the Council, whose office (as well as the entire Council) was abolished. Finally, the total voting power of the borough presidents was made less than that of the officers elected on a city-wide basis to overcome the potential of block voting. The Borough Presidents of Manhattan and Brooklyn, the two most populous boroughs, were given two votes each. Each of the other borough presidents was given one vote, and the city-wide officers were given three votes each. In the Commission's judgment, the addition of the borough presidents to the Board of Estimate and Apportionment was appropriate in that the new charter gave the Board power to disapprove certain decisions of the Local Improvement Boards regarding local improvements, and to determine the amount of money to be expended for public works. The Commission feared, however, that the borough presidents together might control the Board's decisions, thus the weighed vote in favor of the city-wide officials.

had failed to obtain from the Tracy Commission, including substantial authority over the initiation of local improvements, control of public works in the borough, and mapping responsibilities.*

III. *An Interlude—(1901-1934)*

Between 1907 and 1934 several, unsuccessful attempts were made to revise the city charter for a third time. One source of dissatisfaction with the 1901 charter was the role played by the borough president. As indicated, his charter powers were extensive. He controlled a substantial number of governmental functions and executed all contracts for his borough. Frequently, he proposed a project, executed the contract, and supervised and inspected the work. He also hired subordinates and set performance standards. The virtual, total control over borough construction work from its inception to its completion made the borough president's office peculiarly susceptible to

* Under the 1897 (Tracy) charter, the Local Improvement Boards were authorized only to recommend to the Board of Public Improvements that proceedings be initiated for local improvements. In the Tracy Commission's judgment, to furnish each borough with city funds to spend as the borough saw fit, would deprive the city of "unity of development, and would, in effect, destroy whatever advantage is to be expected from consolidation in the direction of skilled oversight and control." Mapping responsibilities were assigned to the chairman of the Board of Public Improvements, as the Commission deemed it undesirable to establish special machinery in each borough for mapping purposes. The Commission further thought that this function would be performed by a city-wide officer in cooperation with the Department of Sewers, the commissioner of which sat on the Board of Public Improvements.

** Charter Commissions and committees were established in 1907, '08, '09, '21, '33 and '34.

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charges of corrupt influences and abusive practices.* Whatever corruption existed in the office was related to influence exerted by the county political organization.** Many public officials and private citizens urged the abolition of the office of borough president and the transfer of service delivery authority to city-wide government.

In 1934 a charter commission headed by former Governor Alfred E. Smith was appointed to revise the city charter. Smith supported the idea of abolishing the Office of Borough President, contending that "the origin of borough government in this city had nothing to do with genuine local sentiment. . . . Its origin was purely political. It was a part of the price paid to powerful borough political leaders when the city charter was revised in 1901." ***

A bitter fight ensued and two months later Smith and the Commission's Vice-Chairman, Samuel Seabury, resigned.

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* The New York State Commission on Governmental Operations reported that "Such concentration of power has potential for abuse. Historically, the office of Borough President has been a breeding ground for scandal." *New York State Commission on Governmental Operations, Background Research on the Top Structure of The Government of New York, Vol. II, February,* 1961, p. 96.

** In his final report to the state legislature, Samuel Seabury, counsel to the legislative committee investigating the departments of government in New York City, reports that "In our municipal economy, the Borough Presidents' offices and the patronage they control are utilized primarily for the benefit of the local political spoilsmen who are supreme within their boroughs." *In the Matter of the Investigation of the Departments of the Government of the City of New York, etc., pursuant to Joint Resolutions adopted by the Legislature of the State of New York. Final Report to members of the Joint Legislative Committee,* Samuel Seabury, Counsel to the Committee, Dec. 27, 1932, p. 35. See also the hearings before the Governor on the removal of John F. Ahearn, Louis J. Haffin, and Lawrence Gresser; the Amen Investigations, 1938-'42; the Seabury Investigations, 1931-'32.

*** *New York State Commission on Governmental Operations, op. cit.*, p. 77.

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IV. *Thacher Commission—(1936)*

On January 12, 1935, Mayor Fiorello La Guardia appointed a new commission under the chairmanship of Thomas Thacher. The Thacher Commission recommended retention of the office, but gave the borough presidents no additional powers. Some powers, in fact, were transferred to the central administration. The Commission stated its position as follows:

> With respect to borough government, the Commission has adopted neither of the two extreme views which were vigorously pressed upon it, the one that the borough president should be abolished and all administration centralized and the other that the existing administrative powers of the borough presidents should be increased rather than curtailed. The Commission is satisfied that there exists in a large part of the city an overwhelming sentiment not only for borough representation on the Board of Estimate but that strictly local improvements, paid for by assessments on the homes of the people in the respective neighborhoods, be entrusted to local officers readily accessible and responsive to the people affected. The Commission believes that this desire for local self-government should be recognized where it is possible to do so without sacrifice of efficiency and economy. Accordingly, the Local Improvement Boards are continued and there is left in the hands of the borough presidents the construction and maintenance of local street and sewer improvements. On the other hand, intercepting sewers and sewage disposal plants, because of their relation to a city-wide service, are continued under centralized

control, and, because they involve principally an engineering project, are placed under the new Department of Public Works.*

Thus the boroughs maintained control over local street and sewer improvements while intercepting sewers and disposal plants were now to be controlled by a central administration, the Department of Public Works.

Jurisdiction over the construction, maintenance and repair of public buildings, previously under the control of the borough president, was assigned to the newly-created Department of Public Works and to other appropriate city-wide agencies.

With respect to the planning, construction and inspection of private buildings, a city-wide Department of Housing and Buildings was created and assigned jurisdiction to ensure uniformity of building regulations and enforcement policies.** However, a representative of the department was appointed to serve in each borough. He had authority over routine administrative matters, subject to review by the Board of Standards and Appeals. Consequently, while enforcement of building regulations was taken from the borough president, it remained an administrative function at the borough level. Further, the Department of Sanitation assumed the duties of the former Department of Street

* *Proposed Charter for the City of New York—Filed with the City Clerk—Aug. 17, 1936 and Report of the New York City Charter Revision Commission*, 1936, pp. 8 and 9.

** In 1933 a Board of Buildings was created comprised of five Borough Superintendents of Buildings. In the Commission's judgment, the need for centralizati a that had led to the consolidation of these departments could not be satisfied by a board whose members were responsible to five different superiors.

Cleaning. Under the revised charter, the new department was responsible as well for the sweeping and cleaning of paved streets and the removal of garbage in Queens and Richmond.

The Board of Estimate's composition and its weighted voting system remained as it had been under the 1901 charter for the Board of Estimate and Apportionment. The borough presidents successfully resisted an effort to remove them from the Board. Those who argued for their removal claimed that they often ignored the interests of the city as a whole when local improvements and other capital projects affecting their boroughs were under consideration.* Although the need for borough representation was upheld, the Thacher Commission did create a City

* The Thacher Commission reported that: "The growth and development of a modern city depends upon the wisdom and foresight with which capital improvements are undertaken and the extent to which the integrity of zoning regulations and of the city map is maintained. Unfortunately such expenditures too often have been undertaken because of local and special pressures and without relation to the interests of the city as a whole. Great waste has resulted and a species of log-rolling has developed in connection with measures affecting local or special interests. Such evils inevitably occur in representative government when several representatives of separate constituencies may join in supporting measures of local or special interest affecting their several constituencies or followings. But such evils are not to be cured by abolishing representative government, or by substituting one representative body for another. They should be controlled by publically confronting the representatives with the interests of the public at large." *Report of the New York City Charter Revision Commission, op. cit.*, p. 10. Further, "It is the convicton of the Commission that such representation (by the Borough Presidents) is not only important in the interests of the boroughs, but in the interests of the city as a whole. Those who administer the manifold affairs of the city should be intimately familiar with the conditions and needs of the five boroughs." *Ibid.*, p. 19.

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Planning Commission "to guide and to influence the city in its development and future growth."* The Thacher Commission's stated objective in creating the City Planning Commission was to ensure that capital expenditures would be authorized for those projects which were most important to the city's welfare.**

The City Planning Commission was given the power to prepare the capital budget to which the Board of Estimate could not add without approval from the Planning Commission, except upon a three-fourths vote. Further, all local assessable improvements costing more than ten thousand dollars ($10,000.00) as well as all public improvements, required City Planning Commission approval, or, in the alternative, a three-fourths vote of the Board of Estimate. The charter also provided for an advisory planning board in each borough, comprised of three members appointed by the borough president. These boards were to advise the borough president and the Planning Commission on all matters within the jurisdiction of the Planning Commission. The advisory boards, however functioned only sporadically.

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* *Ibid.*, p. 10.

** Following a discussion of the Planning Commission's proposed responsibilities, the Thacher Commission stated: "These functions of the City Planning Commission will assure the expenditure of capital resources for those projects which are most urgently needed for the improvement of the city, its future growth and development and its general welfare. They will prevent unnecessary and wasteful expenditure of capital resources upon the credit of the city, which has contributed in the past to the burden of the existing indebtedness of the city now requiring an annual appropriation for debt service of approximately one-third of the revenue raised by taxation." *Ibid.*, p. 25.

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The charter was adopted at a referendum vote held on November 3, 1936.*

V. *Moore Commission—(1961)*

In 1959 the New York State Commission on Governmental Operations was created to study the government of New York City, and to propose recommendations for increased economy, efficiency, and effectiveness in government. During the first year of the Commission's existence it functioned under the chairmanship of Otto L. Nelson, Jr. When Nelson resigned, the Commission continued under the chairmanship of Frank C. Moore, former Lieutenant Governor and State Comptroller.

The Commission's findings emphasized the existence of excessive waste and duplication with respect to functions shared by or in control of borough government.

Insert for Page 17 of Borough President Report

General Conclusions. In its summary report entitled "A New Charter for the City of New York," made public January 16, 1961, the Moore Commission summarized its findings and recommendations in regard to Borough Presidents as follows:

VI. The Borough Presidents

New York City's borough organization is unique, bringing as it does representatives of the boroughs into the top structure of local government. As the

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* The legislative mandate which created the Thacher Commission called for a charter aimed towards more efficient and economical government. The Commission failed, however, to state and specific conclusions regarding the efficiency and economy of operations under the borough president's jurisdiction.

spokesman for his borough, each borough president has the opportunity to render an important service.

It has been noted that the Board of Estimate is over-burdened with administrative matters. In addition to his work on the Board, each borough president is responsible for carrying on extensive operational activities, including street paving and repair, sewer construction and maintenance, the removal of incumbrances, preparation of topographical maps, and the installation and maintenance of street signs.

Extensive staff studies of these operational activities indicated that decentralized control over these expensive functions would be wasteful and unsatisfactory even if all five borough offices operated at peak efficiency. Such wide variations in unit costs between the several boroughs and such deviations from unit costs in private contract work were evident as to render a finding of general efficiency less than possible. The City needs uniform policies, practices, and procedures and the development of city-wide standards. Decentralized field organizations are certainly necessary in such a large city, but there must be centralized control before any steps can be taken substantially to reduce the idleness of expensive equipment and manpower.

Transferring these operational activities to the Mayor's city-wide departments and limiting the functions of the Development Board [proposed successor to the Board of Estimate] will free the borough presidents to devote much of their time and energies to community leadership. The proposed charter provides new opportunities for such leadership.

The operational responsibilities of the borough presidents will be transferred to city departments.

Operations that involve streets, sewers and public structures will go to the Department of Public Works.

The topographical bureaus which handle the city map will go to the Department of City Planning.

The sweeping and cleaning of streets not having permanent pavements in Queens and Richmond will go to the Department of Sanitation.

Removal, storage, and disposal of incumbrances will go to the Department of Purchase.

Responsibility for issuing permits will go to appropriate departments such as the Department of Public Works and the Department of Licenses.

The borough presidents will appoint community district boards.

One of the problems of big-city government is developing citizen participation. In furtherance of this purpose the City Planning Commission will divide the City into a number of community planning districts, reflecting historical boundaries where significant and feasible, e.g.: Harlem, Flatbush, Jamaica, Fordham, and St. George. It will also encourage the gradual gathering of city services in these districts into local community centers.

As an integral feature of this program of community revitalization, each borough president will appoint community district planning boards having from five to nine members each. His central office will provide these boards with specialized staff services.

Councilmen whose districts lie in whole or part in a community planning district will be ex-officio members of the appropriate boards. This liaison with the Council should prove valuable as a means of developing local interest in community planning.

As problems often overlap district boundaries, each borough president may also establish borough-wide planning councils with representation from the community boards.

The borough presidents will operate service and information centers.

Citizen interest in city government is encouraged by a free flow of information. Borough offices will serve as information centers. The status of the borough presidents as members of the Development Board is such that their offices will be of great help in disseminating information to the public.

Each borough president will be authorized to hold public hearings on any matters affecting his borough.

VI. *Moore Commission Findings*

Isolating those factors which were found to contribute importantly to the waste and duplication found by the Moore Commission, we find: *first,* the system of local assessable improvements whereby local property owners were assessed for needed capital improvements led to distortions in the appropriate mix of capital improvement and maintenance expenditures. In large part, this was a consequence of the political risks to the borough president inherent in the system; *second,* that divided responsibility

for street construction, repair and maintenance resulted in considerable waste by failing to take advantage of the economies of scale that could be achieved with respect to certain of these functions; *third,* that the absence of central standards or guidelines for each borough resulted in seriously uneven performance; *fourth,* that the borough presidents generally were more responsive to the needs of individual citizens and less so with respect to system maintenance. This factor, aggravated by the general failure to maintain adequate programs for preventive maintenance, standard measurements of efficiency, and adequate records contributed to the overall inefficiencies found by the Commission; *fifth,* that fragmented responsibility for interrelated functions, especially with respect to sewerage services, led to serious inefficiencies; and, *sixth,* that the absurd fragmentation of responsibility regarding certain permit issuance and construction powers led to waste and confusion.

The findings with respect to specific functional areas are set forth below.

A. *Planning of Arterial Highways*

Pursuant to their duty to construct public roads and their membership on the Board of Estimate, the Borough Presidents planned arterial highways within the borough. They shared this function with a number of city-wide agencies, including the City Planning Commission, the City Construction Coordinator, and the Bureau of Engineering of the Board of Estimate. Moreover, the Tri-Borough Bridge and Tunnel Authority and the Port of New York Authority initiated studies on the need for arterial high-

ways in the city. As a result of overlapping planning responsibilities, these studies were often duplicative, and delays occurred while each agency reviewed plans submitted by other agencies.†

B. *Repair and Maintenance of Highways and Streets*

Expenditures for the repair and maintenance of streets and highways were expense budget items. The annual cost for five boroughs was approximately twelve million dollars, eight million of which was spent on laying surfacing material.* Almost the entire expenditure for laying surfacing material consisted of labor costs because the operation was largely patching of small holes for which manpower rather than machinery was used.

Consultants to the Moore Commission found an inefficient use of manpower. There were no observed differences in the jobs performed by laborers and those performed by high-paid asphalt workers.** Road repairs generally were not performed in bulk, but, rather, scheduled at the foreman's discretion.*** Crews of men were employed year-round, although a year-round operation of asphalt laying was not economically justified.**** Moreover, the system of patchwork repairs employed by the borough presidents was, in the long run, more costly than a meaningful capital improvement program would have been.

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† *New York State Commission on Governmental Operations, op. cit.*, pp. 79-85.

* *Ibid.*, p. 166.

** *Ibid.*, p. 177.

*** *Ibid.*, p. 182.

**** *Ibid.*, p. 188.

Patchwork was necessitated by two major factors: first, cuts made to reach utilities below the street surface, and, second, holes or breaks resulting from excessive use, weaknesses in the surface, aging of surface materials and a variety of other natural causes.

C. *Restoration of Pavement After Cuts*

Cuts in the surface made by private utility companies were generally restored by private paving companies. Contracts for the work were usually executed in bulk, and the restorations made promptly. The borough president's office restored cuts in the surface made by the Department of Water Supply, Gas and Electricity, and several smaller utility companies. The borough president's office also restored cuts made by plumbers in connection with repairs to plumbing facilities in private homes.

A Moore Commission study on the restoration of plumbers' cuts found wide differences among the boroughs regarding the speed with which restorations were made after a cut had been completed, and in the regulation and enforcement policies regarding the plumbers' responsibilities. The lack of written procedures, which was characteristic of the entire highway and street maintenance program under the borough presidents, also drew criticism from the Commission.*

All plumbers were required to backfill their cuts to prevent the restored area from settling. If the restored area settled, cracks developed in the surface, requiring additional repairs to be made. In Queens, a reinspection of

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* *Ibid.*

the restored area was made six months after restoration, and if it had settled the plumber was billed for repairs. In the Bronx, a reinspection was made upon complaint only; and, as in Richmond, the plumbers' liability was generally not enforced. In Brooklyn and Manhattan, the borough assumed responsibility for maintaining the cut after restoration.* The differences in procedures and the resulting cost disparities among the boroughs appeared to have little, if any, relationship to local physical conditions.

D. *Construction of New Streets*

The construction of a new permanent street was classified by the charter as a local assessable improvement, the cost of which was assessed against the benefited property owners. A local assessable improvement was initiated either by petition of the local property owners, or by the borough president upon approval of the Board of Estimate. Historically, the borough presidents were reluctant to initiate these improvements without a petition from the owner against whom the assessment would be made. Consequently, streets in bad repair that should have been replaced by new permanent streets were patched, repatched and sometimes entirely resurfaced as patch repaving paid for out of the expense budget.**

The need for new permanent streets was particularly evident in Queens, where, during its initial development, building permits had been issued without regard for proper

* *Ibid.*, p. 223.

** *Ibid.*, p. 185.

grading controls, drainage plans, or permanent sewers.* Homes were built both above and below the proposed street levels. Streets were not paved properly, as it was difficult to lower the street level when necessary because of a high-water table, or raise it when necessary because of water drainage into homes below the street level. Improper paving caused floods and street cave-ins that could have been avoided by the construction of properly drained and curbed permanent streets. The construction of such streets was hampered, however, by resistance to local assessments. Residents did not petition for the improvement, nor did the borough president initiate them.**

A similar problem of building under circumstances that would subsequently impede construction of properly drained and curbed streets had developed in Richmond.***

The Commission found that these problems were attributable to and could be averted by eliminating the system of local assessable improvements. The Commission also found that central planning and coordination and the elimination of divided responsibility for street construction, repair and maintenance were necessary to the development of new communities and the renewal of already developed areas.****

* From 1897 until the charter effective in 1902, building permits were issued by the City. From 1902 until the charter approved in 1938, the borough president, through the borough superintendent of buildings, issued building permits. After 1938, deputies of the city Department of Housing and Buildings were responsible for building permits issued in the boroughs.

** *New York State Commission on Governmental Operations, op. cit.*, pp. 86, 172-3, and 186.

*** *Ibid.*, p. 186.

**** *Ibid.*, p. 186.

E. *Asphalt Production and Transportation*

Roadway surfacing material was manufactured in five separate asphalt plants. Each plant produced only for the borough in which it was located. This system resulted in considerable waste, as the plants did not operate to capacity. Moreover, some of the plants were much older and less efficient than others* The system used for transporting asphalt was similarly inefficient. Trucks were purchased separately by each borough; often they were underutilized.**

In the absence of central standards or guidelines each borough determined its own truck needs and sizes. The size of the trucks influenced the size of the fleet and the manpower required for the program. These factors affected the cost for transporting asphalt. In Queens, for example, where small trucks and more manpower were employed, the labor cost for haulage was six dollars and thirty cents ($6.30) a ton, almost triple the cost required for Manhattan where larger trucks and less manpower were used.***

F. *Repair and Maintenance of Sewers*

Sewer maintenance was performed mainly in response to complaints. Little work was done on preventive maintenance and cleaning. In 1959-60, thirty-five thousand sewer complaints were received in the boroughs.**** Had the boroughs practiced an adequate program of cleaning and maintenance, the number of complaints would have been substantially less.† An adequate preventive maintenance program, however, could not have been achieved under the borough system for the following reasons:

1. there were wide differences among the boroughs regarding procedures and techniques (not one borough had an adequate program for preventive maintenance according to the standards of the Water Pollution Control Federation);

2. no borough maintained standards against which its programs, operations and staffing could be measured; and

3. no borough maintained an adequate reporting and record-keeping system upon which standards could be based.*

Each borough had different staffing policies for sewer maintenance; the manpower employed was generally unrelated to the work load.** In some boroughs, the sewer maintenance program was overstaffed; in other boroughs it was understaffed. In Brooklyn, understaffing was due mainly to the borough president's policy of not filling vacancies as they occurred; a policy which caused serious problems, as Brooklyn had a number of sewer structures and devices which required regular cleaning to prevent "backup and clogging of sewers and diversion of sewage from the treatment plants to other outlets." ***

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* *Ibid.*, pp. 122-125 and 188.

** *Ibid.*, pp. 148-151.

*** *Ibid.*, pp. 150-151.

**** *Ibid.*, p. 195.

† The Commission estimated that complaints could have been reduced to approximately one-tenth of the calls per sewer-mile. *Ibid.*, p. 201.

* *Ibid.*, pp. 194-197.

** *Ibid.*, pp. 201-206.

*** *Ibid.*, p. 207.

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The results of a questionnaire on sewer maintenance practices sent by the Water Pollution Control Federation to eighty-three cities showed that outside of New York City the average number of sewer-miles per employee for cleaning and repairs was 8.5. Had staffing in New York City been more efficient, approximately one hundred and five (105) fewer employees would have been required.*

The same study found that in four cities of over one million population the "average cost" for repair and maintenance per sewer-mile was five hundred and seventy-eight dollars ($578.00). This average was exceeded in each borough, except Brooklyn, and there, the lower-than-average cost was attributable to understaffing and other deficiencies in the maintenance program, such as failure to clean regularly various sewer structures.**

Fragmented responsibility for the city's sewer system was another factor contributing to the ineffective delivery of sewer services. Sewage disposal plants were designed, constructed, operated and maintained by the Department of Public Works pursuant to the 1938 charter. However, maintenance of internal sewer devices for non-intercepting sewers remained under the borough president's control. Divided responsibility made economical design and operation of the treatment plants difficult to achieve because efficient plant operation often depended upon proper functioning of the internal sewer devices. The Moore Commission recommended that control of the city's sewer system

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* *Ibid.*, p. 206.

** *Ibid.*, p. 211.

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be placed in the same department that controlled sewage treatment and pollution devices.*

G. *Construction of Sewers*

A number of areas outside of Manhattan required construction of public sewers. Here again these improvements were often delayed and sometimes prevented altogether by resistance to local assessments. The borough president rarely initiated these improvements without a local petition. When left to the initiative of local property owners, petitions were not brought; when petitions were brought, sewer construction was often blocked by petitions from affected property owners.**

The difficulties and delays inherent in the procedures for constructing public sewers led, in many instances, to construction of private sewers. These sewers were difficult to incorporate into the public sewer system. Moreover, each borough maintained its own policy regarding service to privately owned sewers. Some boroughs provided no service at all, while others provided partial service.***

The failure to service private sewers on the same basis as public sewers posed an obvious health problem. Should a health hazard occur as a result of the improper functioning of a private sewer, the only governmental recourse was to the Department of Health for inspection and issuance of a summons, which was not always effective as ownership of private sewers was often difficult to trace.

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* *Ibid.*, pp. 88, 252-254.

** *Ibid.*, pp. 242-252.

*** *Ibid.*, pp. 207-208.

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H. *Authority to Issue Permits*

The borough president had authority to issue permits to use or open streets, but additional permits and licenses were required from city agencies depending upon the purpose for which the street was used or opened. Examples of waste and duplication cited by the Moore Commission included the following situation: approval for a street fair was obtained from the Police Department; if the organizers of the fair erected a bandstand in the street, the borough president's approval was required; if the bandstand erected on the sidewalk, the Department of Buildings issued the permit. The location for a newstand was approved by the borough president, but the operating license was issued by the Department of Licenses. A street opening to install a conduit required the borough president's approval, but the conduit itself was approved by the Department of Water Supply. Needless to say, divided responsibilities and powers over the same and related functions created confusion and inefficiency.*

I. *Construction and Maintenance of Bridges and Tunnels*

The borough president's authority over construction and maintenance of bridges and tunnels extended only to those that formed a portion of the highways. Jurisdiction over bridges and tunnels that crossed navigable streams remained with the Department of Public Works. Bifurcated responsibility led to an absurd division of labor. If, for example, a bridge or a tunnel formed a portion of a highway, but extended across a navigable stream, the borough

* *Ibid.*, pp. 95-96.

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president maintained the highway on both sides of the stream but not on the bridge across the stream.*

J. *Placing Street Signs*

The borough president placed all street signs in the borough. Arterial highways often spanned more than one borough and, consequently, a need was expressed for standardized signs.** Even this relatively simple task became the subject of controversy and confusion.

The Moore Commission was not authorized to draft a charter and submit it to a referendum vote for approval. In 1961 a general law was passed by the legislature enabling the Mayor of any city to appoint a charter commission having authority to submit its proposals to a referendum vote. Pursuant to this law Mayor Wagner appointed a Commission to revise the city's charter. The Commission headed by the Honorable John T. Cahill was mandated to provide a more "efficient, economical and effective" city government.

VII. *The Cahill Commission—(1963)*

Relying in large part upon the Moore Commission's findings, the Cahill Commission recommended reduced powers for the borough presidents, and the new charter became law on January 1, 1963. Its impact on the office of borough president is set forth below:

1. with the exception of the Topographical Bureau, the borough president was no longer responsible for streets

* *Ibid.*, pp. 96-97.

** *Ibid.*, p. 97.

and highways, lots and vaults, sewers, incumbrances or street signs;*

2. special assessments for local improvements were abolished. Local assessable improvements were redefined as capital projects to be included in the capital budget.** Property owners maintained the right to petition the Board of Estimate for a local improvement in instances where the petitioners were willing to pay the cost of the improvement;***

3. jurisdiction over streets and highways became the responsibility of the Department of Highways, along with authority over the filling of sunken lots, fencing of vacant lots, digging down of lots and licensing vaults under the sidewalks;

4. jurisdiction over construction and maintenance of all sewers and sewage disposal plants became the responsibility of the Department of Public Works. The Department of Public Works also assumed jurisdiction for all bridges and tunnels and over the construction and maintenance of public baths and comfort stations not under the jurisdiction of the Department of Parks;

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* Ch. 4, sect. 82 of the New York City Charter effective January 1, 1963 maintains the Topographical Bureau under the borough presidents; but general jurisdiction over matters related to streets and sewers became the responsibility of central departments.

** Ch. 9, sect. 211 of the New York City Charter effective January 1, 1963 defines "capital project" to include projects that the 1938 Charter defined as "assessable improvements."

*** Ch. 9, sect. 229 of the New York City Charter.

5. the removal of incumbrances became the responsibility of the Department of Sanitation;

6. the control, design and placing of signs indicating streets and public places became the responsibility of the Department of Traffic.

VII. *Present Borough President Charter Powers*

When compared to the functions performed by the borough president prior to the 1963 charter, his current duties appear insubstantial. The formal remaining charter powers are as follows:

1. The Board of Estimate: The borough president is a member of the Board of Estimate.* As such, he votes on the city's capital and expense budgets, franchises, city leases, zoning resolutions, use of city property, housing projects, private subdivisions, city map changes, and on other matters of substantial city and borough-wide importance.**

2. The Topographical Bureau: Each borough president maintains a Topographical Bureau. The Bureau's main functions are the compilation of sub-surface data; the preparation of maps, plans, profiles, and grade data covering sewers and highways in the borough; and the issuance of house numbers.*** With the exception of the Topo-

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* *Ibid.*, ch. 3, sect. 61.

** See generally the New York City Charter effective January 1963 for powers of the Board of Estimate.

*** Letter from Charles H. Tenney, City Administrator to the Honorable Robert F. Wagner, Mayor, December 12, 1962, in which the proposed organization of the Office of Borough President under the 1963 charter is explained.

graphical Bureau, the borough presidents no longer maintain jurisdiction over any matter related to streets and sewers.

3. Site Selection: The borough president serves on the Site Selection Board with the Director of the Budget, the Administrator of Municipal Services, the Comptroller and the Director who heads the City Planning Department and is chairman of the City Planning Commission. The borough president votes only on capital projects located wholly within his own borough.*

4. Capital Projects: The borough president may recommend capital projects. He may make recommendations to the appropriate department chief; to the City Planning Commission; to the Mayor, and finally, he may make recommendations to the Board of Estimate, which votes on the budget.**

5. Appointments to The Community Boards: Each community planning district in the borough has a Community Board to advise the borough president, the City Planning Commission, the Borough Improvement Board and other public agencies on matters related to the district's "welfare and orderly development." Each Community Board is comprised of the councilmen-at-large, the councilmen from any area which includes part or all of the community district, and not more than fifty (50) people appointed by the borough president in consulation with the councilmen and

* Ch. 9, sec. 227 of the New York City Charter, effective January 1, 1963.

** General authority to recommend capital projects is contained in Ch. 4, sect. 82 of the New York Charter.

councilmen-at-large. The borough president must call a meeting at least once a year with the chairmen of the community boards and the members of the City Planning Commission. Other city officers may attend at the invitation of the borough president. Also, the borough president must attend a similar meeting called by the Mayor at least once a year to discuss with the chairmen of the community boards the city master plan and other planning matters affecting the city as a whole or more than one borough.*

The borough president is the official custodian for the minutes and all the records of the boards.**

6. Chairman of The Borough Improvement Board:*** Borough Improvement Board is comprised of the councilmen elected from the borough and the borough president, who is Chairman of the Board. The charter mandates that the Board hold public hearings at stated intervals, and report to the Board of Estimate, the Council, the Mayor and the City Planning Commission on borough programs and proposed capital projects. The Board is empowered to employ technical and clerical assistants. The Borough Improvement Boards, like the Community Boards, are advisory bodies, without power to implement their recommendations.

* Ch. 9, sect. 84 of the New York City Charter, effective January 1, 1963, as amended.

** *Ibid.*

*** A separate report on the history and present functions of the Borough Improvement Board is being prepared for the Commission.

**** Ch. 4, sect. 85 of the New York City Charter, effective January 1, 1963.

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7. Staff: The Borough President may appoint and remove a Deputy and an Executive Assistant. He may also appoint a secretary and assistants, clerks and subordinates as he deems necessary and for which there are appropriations. While these latter appointments are at the borough president's pleasure, they are subject to the civil service law.*

8. Spokesman and Community Advocate: The borough president is authorized to hold public hearings on matters of public interest, and to make recommendations to the Mayor and to other city officials in the interests of his borough.** In the performance of these duties citizens come to him with complaints about city services or requests for information. The borough president in the past had power both to receive complaints and to act upon them by virtue of his jurisdiction over a wide range of matters. The present charter gives little power to act upon complaints, except that the borough president may and does refer the complaints to the appropriate agency.

The exercise of power and the informal sources of borough president influence are discussed in the following chapter.

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* *Ibid.*
** *Ibid.*

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Table I-1

Powers Transferred to Borough Government by the Rives Commission (1906)

1. power to appoint and remove at pleasure a Commissioner of Public Works for the borough. The Commissioner discharged all administrative power relating to streets, sewers, public buildings and supplies conferred upon the borough president;

2. power to appoint a secretary, assistants, clerks, and subordinates and remove them at pleasure subject to provisions of the civil service laws;

3. jurisdiction over the regulating, grading, curbing, flagging and guttering of streets and laying of crosswalks;

4. jurisdiction over the paving, repaving, resurfacing and repairing of all streets;

5. jurisdiction over the construction and repair of public roads;

6. jurisdiction over the relaying of surface railroad tracks in any public street or road;

7. jurisdiction over the filling of sunken lots, fencing of vacant lots and of licensing vaults under sidewalks;

8. jurisdiction over the removal of incumbrances;

9. jurisdiction over the issuance of permits to builders and others to use or open the streets;

10. jurisdiction over construction and maintenance of bridges and tunnels within the borough and which form a part of its highways, except bridges over navigable streams;

11. jurisdiction over all subjects relating to public sewers and drainage;

12. jurisdiction over the construction and maintenance of public buildings;

13. jurisdiction over public baths and comfort stations, and the placing of street signs;

14. power to prepare all contracts relating to the borough subject to approval as to form by the Corporation Counsel;

In addition, Queens and Richmond, the borough president supervised the sweeping and cleaning of streets and the removal of garbage. In the other boroughs these functions were performed by a central Department of Street Cleaning.

CHAPTER II

The Present Role of the Borough President in New York City Government

In order to define the borough president's present role in New York City government, this chapter presents: *first,* the organizational structure of the office; *second,* the borough president's intraborough role; and *third,* his general role in relationship to city-wide agencies responsible for borough service delivery and planning functions. The organizational structure of the Office of Borough President is presented in Diagram 2-1.

I. *The Borough President's Intraborough Role*

A. *Citizen—Political Contacts*

The Borough President maintains regular contact with, and is easily accessible to, private, voluntary organizations within the borough. He holds frequent meetings with local homeowner associations, builders and developers, as well as community and special interest groups which for one reason or another are affected by, and seek access to, municipal government.

His power to appoint community planning board members as well as the staff support that he offers such boards provides him with a steady flow of information regarding the problems and views of the discrete communities that comprise the borough. The Borough President's close ties to the boards are at present a moderate source of influence and power which, as the boards mature and obtain addi-

tional resources, promises to develop into a more important factor in the planning of borough capital projects.*

In most boroughs, the Borough President has some contact with councilmen either in the structured atmosphere of Borough Improvement Board meetings where he presides as chairman and determines the agenda, or in the less formal contacts required of public officials who share constituencies or party affiliation. These contacts are an additional source of influence and community information.**

Historically, the Borough President has been closely linked to the regular county political organization. In recent years, several borough presidents have been supported by reform organizations as well.*** Generally, the county leader in consultation with other political leaders would choose the party's candidate for Borough President. The office, therefore, became an important source of patronage for the county organization. When the Borough President had the responsibility for and the control of public works, for example, he would appoint corporation inspectors on the recommendation of the county leader to whom he owed his nomination. District leaders might serve as commissioners

* It should be noted, however, that recent experiments initiated by the City Planning Commission which are designed to increase Community Board powers could conceivably result in closer ties between the boards and central government institutions at the expense of the borough presidents.

** The Borough Improvement Boards have little power. They have been appropriated some planning funds, however, and substantial control over the expenditure of these monies may be considered a marginal source of power for the borough president.

*** The use of the terms "reform" and "regular" are not meant to imply either superior political virtue in the former or the absence of progressive leadership in the latter. They are simply descriptive of distinct political organizations within the city.

or deputies of the line agencies. Contractors or developers in the Borough might influence the Borough President's letting of contracts or his voting in the Board of Estimate by reason of their influence with the county leader. Parenthetically, we should emphasize that these relationships are set forth to establish the Borough President's ties to the county organization. We have no evidence that patronage is less likely to be a problem at the central or district levels, or in fact, that certain forms of patronage are not desirable.

It is not within the scope of this report to document the nature and extent of the present power of the county political leadership in each of the boroughs. But it is important to point out that despite the general decline in influence of the county leader in the recent past, city-wide officials and those who like to become city-wide officials often look to him for support in primary and general elections. Moreover, the county leader continues to exercise substantial influence at the state level, especially in the selection of legislative leaders. Thus, in those boroughs where the Borough President is closely tied to the county political organization, he derives from it an additional and sometimes potent source of influence with respect to the administration's policies as they affect his borough. In addition, the backing of organized reform or regular political organizations with strong grass-root ties in certain areas has contributed to the power and influence of the borough president.*

* It should be noted in this regard that mayors also have attempted to duplicate this kind of political support when it was not readily available to them from existing political organizations, as witnessed, for example, by the John V. Lindsay clubs.

B. *Memberships*

The Borough President's position on the Board of Estimate is a major source of his influnce and statute. Few community issues of consequence or projects of any scope escape the Borough President's attention and generally they reach him at the earlier stages of their development. A builder, for example, who needs an approval for his project from the Board of Estimate, a variance from the Board of Standards and Appeals or the support of a community planning board often will seek the Borough President's views before he submits his plans to an official body. Local merchants may seek his commitment to vote in the Board of Estimate against the approval of a bus franchise that would enable shoppers to travel easily to a more distant shopping center, thus adversely affecting the merchants' sales. The Borough President's membership on the Site Selection Board (discussed infra), together with his Board of Estimate membership, gives him a reasonably strong role in influencing capital developmnt within the borough. With the technical resources available to him through his engineering staff and topographical bureau, he is well informed as to the issues and well situated to have some, but by no means a controlling influence over borough development.

C. *Various Roles Played by the Borough President*

Elected by a borough-wide constituency, he is generally perceived as an advocate for borough interests. A line administrator having formal decision-making power over an interest ordinarily will pay attention to his views, if only because often he is the most knowledgeable public

official with respect to the competing influences and forces in the affected community.

Frequently, the Borough President will be cast in, or assume the role of, a broker between a city administrator and the community or special interest group with a stake in the administrative decision. A community threatened with a reduction in the manpower assigned to its local police precinct, for example, may appeal first to the Borough President for intervention at a higher level of city government than that which is accessible to the community itself. He may arrange a meeting or series of meetings to which he will invite high-level city officials and community representatives. Few city officials will ignore such an invitation. Notwithstanding his lack of formal charter powers, the Borough President is an important political figure and a public official with a large constituency. Not only does he influence community opinion, but he has access to other city officials and political leaders who may be important to the success of the agency's programs or to the administrator's political career.

While his own views may not always prevail, as a broker-advocate for borough interests he can and does afford private citizens within his borough direct access to decision-makers at the highest levels of the city administration. Moreover, because he is a public official with significant political standing, such meetings are carried out in an atmosphere that suggests a rough equality of position rather than the supplicant-bureaucrat relationship that characterizes much of the private citizen—public official contact in New York City.

In advancing the interests of his community, however, the Borough President must be sensitive to his own need

for a continuing and friendly relationship with central city officials. His influence over govermental decisions that are important to him, as well as his ability to secure the scores of small favors that he requires to service his constituents, depends in part on the good will of the administrators who manage or head the major city departments. In a real sense, therefore, he must be a broker as well as an advocate.

Tradition, existing power relations, the extent to which he is able to mobilize community support over a specific issue, all play a part in determining whether the Borough President will be successful in dealing with city-wide officials. But the stance that he assumes and the likelihood of his success depends also on the nature of the issue. With respect to some issues, he has little real influence.

II. *The Borough President's General Role with Respect to Borough Service Delivery and Capital Development*

A. *The Borough President's Influence Over Service Delivery In the Borough*

1. *Routine Service Delivery*

The line agencies must come before the Board of Estimate for expense budget approval. It would appear, therefore, that the Borough President is in a good position to recover, if not the inter-borough allocation of resources, at least the intra-borough mix of services and program priorities reflected in agency expense budgets. In fact, he has relatively little impact on the expense budget.

First, he has little information as to the underlying rationale for the allocation of resources among the different boroughs or programs. Together with the Bureau of Budget, the agency will have prepared its programs months in advance of submission to the Board of Estimate. Constrained by the lack of staff resources capable of critically evaluating the agencies' programs, and lacking the technical data upon which they are based, the Borough President can do little more than interrogate the agency heads and for the most part accept their responses. He may, from time to time, point out the inadequacy of service in a community or ask an embarrassing question at the budget hearing, but this is a far cry from exercising any real impact on the agencies' priorities.

Second, the Borough President has little influence with respect to budget modifications throughout the year. The shifting of resources within an agency is carried out by the agency and the bureau of the budget. Obviously, this power is crucial to the exercise of substantial influence over service functions. Without some formal capacity to influence budget modifications it is extremely difficult for the Borough President to exercise any real influence over services within his borough.

Third, the community support and media coverage that the Borough President often can generate around a controversial capital project is more difficult to sustain in the case of service delivery problems which are endemic to the entire city.

Fourth, the agency itself has limited control over its own priorities. Hedged in by budget constraints, union and civil service rules, the need to continue established programs, and the Mayor's own priorities, the line agency has relatively little discretion to modify substantially its own programs.

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Accordingly, the Borough President has little to say about the ongoing service delivery operations within the borough.

2. *Specific Complaints*

Although he is unable to alter substantially the mix of services delivered to his borough, the Borough President does have some impact on specific service complaints brought to him by his constituents. Where, for example, his office receives what appears to be a serious instance of service breakdown, he will ask the relevant agency personnel (generally he or his deputy develops several personal contacts within the central agency or its borough command) to give the problem a higher priority than it would ordinarily receive. The agencies, especially water resources and sanitation, which comprise a large percentage of service delivery complaints at the borough level, are besieged with similar requests each day from district leaders to congressmen, and so there seems to be a tacit understanding of the permissible limits of the Borough President's influence over day-to-day maintenance and repair programs; he uses his influence sparingly.

It appears that approximately 90% of the requests for consideration received in the Borough President's offices are systematically forwarded to the appropriate city-wide agency. Typically, a letter from the Borough President is forwarded to the appropriate bureau chief. In the letter the Borough President requests service of the complaint. A carbon copy is mailed to the constituent-complainant. Generally, the routine procedure is understood by both the Borough President and the line agency not as an urgent appeal for help, but rather as the formal exercise of a governmental responsibility and perhaps political necessity.

Exhibit 7 Annexed to the Appendix to Plaintiffs' Memorandum of Law

With respect to more important complaints which seem to merit special attention, a telephone call to the appropriate agency official generally will secure satisfaction. It should be pointed out, however, that even where the complaint is treated routinely, the complainant is at least directed to the correct agency and level within the agency, a not insubstantial contribution to the emotional well-being of a complainant who might otherwise bounce from civil servant to civil servant in an effort to secure satisfaction of his complaint. (See discussion infra, p. 64.)

B. *The Borough President's Influence Over Capital Projects*

The Borough President's capital development inputs are greater than those having to do with service delivery.

The major avenues for direct, formal involvement by the Borough Presidents in the planning process are the Site Selection Board and the Board of Estimate.

The Board of Estimate affords Borough Presidents the opportunity to veto or delay projects which they (or their constituents) do not want. The practice of borough courtesy, usually, but not always followed, gives a Borough President in effect ten out of the twenty-two votes on the Board. The leverage thus obtained can be a crucial bargaining point in the negotiations which surround consideration of the Board's extensive agenda.

Opportunities for negotiation are also found when the Board is acting on the capitl budget. Here a Borough President has more than delay or veto powers. He can and often does insist that capital projects which he favors but which have not been included in the Mayor's executive capital budget are included as a precondition for approval

of the entire capital budget. As the commission already knows, however, the inclusion of a project in the capital budget does not mean that it will be built.

Typically, the Borough President determines the borough's priorities, evaluates the Mayor's budget to determine whether it reflects those priorities and then meets in an executive session which excludes the Mayor. In the executive session, the Comptroller provides the Borough Presidents with the requisite fiscal information, enabling them to amend in recent years anywhere from 100 to 150 million dollars worth of capital projects. The Borough President's staff resources, especially his engineering staff and topographical bureau, provide him with the technical expertise required to compete with the administration, and the fact that the projects are brought before the Board each year enables him easily to keep track of their progress. Moreover, because the Board is the final authority in zoning and other land use matters, the Borough President has additional leverage in affecting the administration's capital planning decisions. Our impression is that the administration generally has its way on the Board, but that it must pay a price to borough interests, often in accepting capital projects favored by the Borough President.

The Borough President's membership on the Site Selection Board is another point of access to capital project decision-making. However, the Board is dominated by city officials who are concerned primarily with site-selection criteria that emphasize the dollar costs of comparable sites. For example, the Board ordinarily will try to select a site owned by the city and thus avoid condemnation costs. As a second preference, the Board will look to an unimproved and unoccupied site so as to avoid demolition costs as well

as the social and fiscal problems associated with relocation. Such factors as topography, proximity to transportation, soil conditions, availability of water and sewerage all weigh heavily in the siting decisions arrived at by the city members who meet prior to the Board's formal meeting to coordinate their positions.

The Borough President, however, tends to be more concerned with community preferences where they are ascertainable. If, for example, an otherwise suitable location for a sanitation garage meets with local opposition, the Borough President's need to be responsive to his constituency generally outweighs his role as a city-wide official responsible, in theory at least, for the city's overall fiscal condition. As some major controversies have demonstrated, however, community opinion may not crystallize until after the site selection process. Thus the Borough President may not be wedded to particular positions, while the city-wide representatives usually are committed.

This is not to suggest that in all capital projects the Borough President's sole concern is with community sentiment. It is not. Nor is it to suggest that the city-wide members ignore community preferences. They do not. Obviously, these are more subtle questions of emphasis and direction rather than hard and fast political rules.

In the context of capital planning, the Borough President's access to the media is relatively important whereas with respect to service-delivery problems, it appears to be less so.

A community opposed to the location of a narcotics treatment center, for example, may enlist the support of the Borough President because his access to the media is much greater than that of the local councilman. The Borough

Presidents are, of course, sensitive to this potential, as is the Mayor. No doubt even the unexpressed threat that a Borough President may "go public" on a given issue carries weight with the administration.

Informal proceedings involving bargaining between the Borough Presidents and other city officials expand the influence of the boroughs, but not to the point where borough residents have a substantial voice in what is being planned for their communities. The formal determination whether to actually construct a project rests with the Bureau of the Budget. The initial planning is carried out at the City level.

The Borough President does have some access to the city agencies involved in the planning process. But his overall impact on the planning process is relatively small.

The principal agency for planning is the City Planning Commission and its staff and service arm, the Department of City Planning. The Commission and the Department have a City orientation and to a considerable degree they are mayorally dominated. Borough input is limited and informal. All of the Commission members are appointed by the Mayor. There is no Charter requirement for borough representation. In fact the Commission's membership suggests a distinct Manhattan orientation. At present, of the seven members (including the chairman), four are from Manhattan, two from Brooklyn, and one from Queens. Thus two boroughs are not at all represented.

In recent years, however, the Commission itself has established some degree of borough decentralization. Borough offices have been established. The borough offices review all proposals relating to planning within the borough, including zoning, mapping, and capital budget projects. In

addition, the borough offices besides serving as the actual physical location for meetings with community leaders, increasingly serve as a liaison between neighborhoods and the Commission. While those who staff the offices do not have the authority to approve or disapprove projects, their recommendations carry considerable weight with the Commission. Too, there has been an increasing borough focus on capital planning.

As previously noted, the community planning boards add some, but not very much, to the boroughs' role in the planning process. They are, of course, district and not borough-wide bodies. Although acceptance of the legitimacy and the value of the more than five dozen community planning boards has risen, these boards as yet receive inadequate funds and their role remains advisory. The Charter provides that the boards advise the Borough Presidents and the City Planning Commission, but in fact the boards are most closely related to the Borough President.

One of the major weaknesses of the borough's role in influencing the city's capital planning process is the Bureau of the Budget's strength in that process and the lack of influence which the Borough President has over the bureau.

While not essentially a planning agency and though its functions are barely alluded to in the Charter, the Bureau of the Budget is a highly active participant in the planning, approval and execution of capital projects. Few things are accomplished without Bureau approval and virtually nothing without its involvement. As an arm of the Mayor's office, the Bureau of the Budget is even less related to and subject to the influence of borough processes and pressures than is the City Planning Commission.

To be sure, this situation is not entirely disadvantageous to the Borough Presidents. As discussed elsewhere in this

report, removal from authority over planning brings with it removal from acceptance of responsibility for what others do or want done. Indeed, the political position, if not the governmental one, of the Borough Presidents is protected by virtue of the limited role that they play in the city planning picture. When the capital budget is up for adoption, for example, Borough Presidents are able to secure inclusion of items, although there may be a covert agreement that at least during the fiscal year covered by that capital budget there will be no progess on these items. On other occasions, Board of Estimate members may privately agree to approve an agenda item formally opposed by the Borough President in whose borough the project is to be located. Thus the Board of Estimate, it must be emphasized, is often a convenience to Borough Presidents, for its processes and practices permit them their role as borough advocate. But there are costs to this system and they are ultimately chargeable against the role of the boroughs in the city-wide planning processes.

In sum, therefore, the formal and informal processes of the Board of Estimate, Site Selection Board and other sources of planning influence, as important as they are, leave the Borough Presidents and the boroughs as secondary figures in New York City planning; they are reactors to the plans and proposals of others rather than innovators. If borough decentralization is contemplated, existing arrangements are insufficient to insure borough residents a long-range, consultative, and meaningful role in the capital projects planned for their borough.

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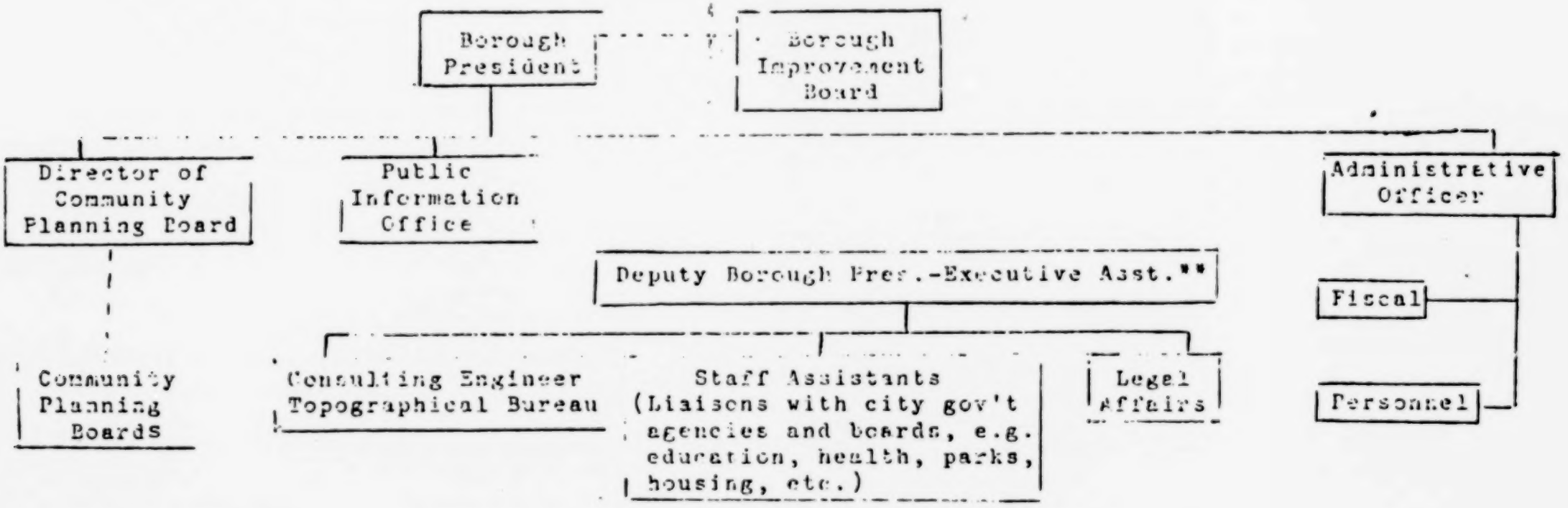
Exhibit 7 Annexed to the Appendix to Plaintiffs' Memorandum of Law

DIAGRAM 2-1

ORGANIZATIONAL CHART OF THE OFFICE

OF BOROUGH PRESIDENT*



Principal Boards of City Government on which the Borough President is a Member:

Board of Estimate

Site Selection Board

_____Direct reporting responsibility

-----Partial reporting responsibility

* Each office of Borough President is organized in a slightly different manner.. This organizational chart is intended to be representative of the basic organizational structure of this offic

** The responsibilities between Deputy Borough President and Executive Assistant [illegible]

Statement of Frank V. Ponterio of Genuine Issues of Facts Pursuant to Local Rule 9(g), dated February 1, 1984

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81-CV-3920 (E.R.N.)

MORRIS et al.,

Plaintiffs,

—against—

THE BOARD OF ESTIMATE et al.,

Defendants,

FRANK V. PONTERIO, et ano.,

Intervenor-Defendants.

The following is a statement of facts alleged by plaintiffs to be undisputed to which intervenor-defendant objects on the ground that genuine issues exist as to such alleged facts as particularly set forth in intervenor-defendant's affidavit and memorandum of law:

1. Whether, cumulating representation by the borough and city-wide Board representatives, the extreme deviation from a norm of representation on the Board is +78% (ref. Plaintiffs' Statement of Facts Pursuant to Local Rule 3 (g), para. 14). Using a valid methodology, as proposed by your intervenor-defendant, extreme deviations from norm are shown to be 16.04% for the full Board and 22.99% for the mayorless Board.

Statement of Frank V. Ponterio of Genuine Issues of Facts

2. Whether, under the present system of representation on the Board, representatives of 41.7% of the population of the City can control a majority of votes on every budget measure (ref. Plaintiffs' Statement of Facts Pursuant to Local Rule 3 (g), para. 21). Plaintiffs' methodology for computing such percent is invalid since it does not reflect the representation of city-wide members. Furthermore, said 41.7% figure refers only to cases where a simple majority of the mayorless Board is required for a budget override and does not, therefore, account for votes on "every" budget measure. In some cases a two-third vote is required, and, using plaintiffs' methodology, the smallest percent of City population which could control a majority of votes is 68.4%. Using a valid methodology, as proposed by your intervenor-defendant, comparable extreme percent differences from norm are shown to be 22.99% for simple majority votes and 14.76% for two-thirds majority votes.

Respectfully submitted,

/s/ FRANK V. PONTERIO
Frank V. Ponterio, pro se
Intervenor-Defendant
766 Pelton Avenue
Staten Island, NY 10310
(212) 981-7953

Dated: January 24, 1984
Staten Island, N.Y.

Statement of Frank V. Ponterio
of Genuine Issues of Facts

CERTIFICATION OF SERVICE

FRANK V. PONTERIO, an attorney duly admitted to practice law in the Courts of New York State, certifies under penalty of perjury that he served the within Statement of Genuine Issues of Facts Pursuant to Local Rule 9(g), Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment on Remand from the Second Circuit, and Affidavit in Opposition to Plaintiffs' Motion for Summary Judgment on Remand from the Second Circuit, by delivering a true copy thereof by hand to the following on February 1, 1984:

Richard Emery, Esq.
New York Civil Liberties Union
Attorney for Plaintiffs

Alan Rothstein, Esq.
Citizens Union of the City of New York
Amicus Curiae

James Hiler, Esq.
Corporation Counsel for the City of New York
Attorney for Defendants

Hon. Robert Straniere
N.Y. State Assembly Member
Intervenor-Defendant

Kathryn Rooney, Esq.
Hon. John Marchi
N.Y. State Senator
Amicus Curiae

/s/ FRANK V. PONTERIO
Frank V. Ponterio

Dated: February 1, 1984

Supreme Court, U.S.
FILED
JUN 13 1988
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 87-1022, 87-1112

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of New York, ANDREW STEIN, individually and as City Council President, HARRISON J. GOLDIN, individually and as Comptroller for the City of New York, HOWARD GOLDEN, DAVID N. DINKINS, STANLEY SIMON, CLAIRE SHULMAN, RALPH J. LAMBERTI, each individually and as Borough Presidents of the boroughs of the City of New York,

Appellants,

—and—

ROBERT A. STRANIERE, individually and as a member of the New York State Assembly,

Intervenor-Appellant,

—against—

BEVERLY MORRIS; JOY CLARKE HOLMES; JOANNE OPLUSTIL,

Appellees.

FRANK V. PONTERIO,

Intervenor-Appellant,

—against—

BEVERLY MORRIS; JOY CLARKE HOLMES; JOANNE OPLUSTIL,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

(Volume II—Pages JA 351 to JA 627)

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*Counsel of Record

APPEAL DOCKETED DECEMBER 17, 1987
PROBABLE JURISDICTION NOTED APRIL 4, 1988

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Affidavit of Frank V. Ponterio, Read in Support of Motion to Deem Issues Resolved, dated September 30, 1983 ..... JA 210

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Reply Affirmation of Frank V. Ponterio, dated in Partial Reply to the Affirmation and Exhibits in Support of Summary Judgment, dated May 2, 1985 ..... JA 596

Supplemental Reply Affirmation of Frank V. Ponterio, Read in Reply to a Letter, with Enclosures, from Richard Emery to this Court, dated May 17, 1985 with Annexed Exhibit ..... JA 606

Exhibit (1): Letter from John F. Banzhaf, III, to Edward R. Neaher, Circuit Judge, dated May 22, 1985 ..... JA 620

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Affidavit of Frank V. Ponterio, Read in Opposition to Plaintiffs' Motion for Summary Judgment on Remand from the Second Circuit, dated January 24, 1984

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81-CV-3920 (E.R.N.)

BEVERLY MORRIS, JOY CLARKE HOLMES, JOANNE OPLUSTIL,

Plaintiffs,

—against—

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of New York, CAROL BELLAMY, individually and as City Council President, HARRISON J. GOLDIN, individually and as Comptroller for the City of New York, HOWARD GOLDEN, ANDREW STEIN, STANLEY SIMON, DONALD MANES, ANTHONY GEATA, each individually and as Borough Presidents of the Boroughs of the City of New York,

Defendants,

FRANK V. PONTERIO and ROBERT STRANIERE,

Intervenor-Defendants.

Dated: January 24, 1984

FRANK V. PONTERIO, pro se
Intervenor-Defendant
766 Pelton Avenue
Staten Island, New York 10310

Affidavit of Frank V. Ponterio in Opposition to Plaintiffs' Motion for Summary Judgment

State of New York
County of Richmond ss.:

FRANK V. PONTERIO, an attorney duly licensed to practice law in the State of New York, being duly sworn, deposes and says:

1. I am an intervenor-defendant in this action and have previously submitted my credentials to this Court.

2. This affidavit and accompanying memorandum of law are submitted in opposition to plaintiffs' motion for summary judgment and in further support of my motion to deem issues resolved.

3. Upon appeal of the decision of this Court that the Board is not subject to one person, one vote principles, plaintiffs asked the U.S. Court of Appeals for the Second Circuit to direct entry of summary judgment based upon plaintiffs' strained application of the *Abate*• test to the Board which purported to show a facially unconstitutional malapportionment. That Court rejected plaintiffs' plea and directed this Court to:

a) Devise an appropriate methodology for analyzing apportionment of the Board,

b) Employ such methodology to measure the degree of malapportionment of the Board, and

c) Rule on the policies and interests which the Supreme Court has held may justify deviations from the literal one person, one vote formula.

4. Plaintiffs' memorandum of law and accompanying papers, and the memorandum of law of amicus curiae Citi-

• *Abate* v. *Mundt*, 403 U.S. 182 (1971).

Affidavit of Frank V. Ponterio in Opposition to Plaintiffs' Motion for Summary Judgment

zens Union are totally non-responsive to the Court of Appeals' direction on remand. On the issue of measurement of malapportionment, plaintiffs have resubmitted the same approach previously argued before this Court (now in two variations as Methods 3 and 5) in which city-wide votes are allocated to the boroughs. Plaintiffs also offer a second approach (in three variations as Methods 1, 2, and 4) which deals with only borough votes. Both approaches have already been tacitly rejected by the Court of Appeals. Moreover, plaintiffs' own expert, Prof. Steven J. Brams, unqualifiedly rejects methods 3 and 5, thus contradicting the fundamental premise of the approach plaintiffs have taken since the inception of this action. Methods 1, 2, and 4 are essentially a single method with inconsequential variations. These methods ignore altogether the city-wide votes contrary to the Court of Appeals' direction to examine the ". . . combination of at-large and local seats, in the context of the voting procedures of the Board", *Morris* v. *Board of Estimate*, 707 F.2d 686, 690. Furthermore, this Court rejected an identical approach, applied to the City Council, in *Andrews* v. *Koch*, 528 F.Supp. 246. The variations involve the particular measure used to quantify malapportionment: viz., population ratios in method 1; percent deviations from average of population-per-representative ratios in method 2; and percent deviations from average of representative-per-population ratios in method 4. Since the measures used in methods 2 and 4 are merely mathematical reciprocals of each other, the results of one method follow by arithmetic alone form the results of the other and no different substantive principles are involved. The same is true of methods 3 and 5 in which city-wide representation is allocated among boroughs proportional to

borough populations. Both these methods were implicitly rejected by the Court of Appeals' refusal to direct summary judgment in favor of plaintiffs on the strength of plaintiffs' Method 3 analyses.

5. In computing percent deviations in Methods 4 and 5, plaintiffs have committed a basic blunder indicative of a lack of understanding of percent computations. In tables on page 34 of plaintiffs' memorandum of law, plaintiffs have computed percent deviations for a different base in each case. A fundamental principle of arithmetic requires that a consistent set of percents must be computed for a common base.* Exhibit 1, selected pages from an ele-

* To illustrate, suppose one wishes to determine the percent deviations of two numbers (e.g., 50 and 150) from a third number (e.g., 100). The correct answer is that both deviations are 50% (with opposite signs), i.e., 50 is 50% less than 100 ($\frac{50-100}{100} \times 100\% = -50\%$) and 150 is 50% more than 100 ($\frac{150-100}{100} \times 100\% = +50\%$). It is incorrect to describe the two percent deviations using different bases (as plaintiffs have done), i.e., to compute the deviation of 50 from 100 using 50 as the base and to compute the deviation of 150 from 100 using 150 as the base. This would result in the following wrong answer: 50 is 100% less than 100 ($\frac{50-100}{50} \times 100\% = -100\%$) and 150 is 33⅓ more than 100 ($\frac{150-100}{150} \times 100\% = +33\frac{1}{3}\%$). In dealing with differences Plaintiffs are also apparently confused by reciprocals. Note that if one wishes to compute the percent differences of the reciprocals of the illustrative numbers (i.e., 1/50 and 1/150 vs. 1/100), the two correct percent deviations are *not* the same: 1/50 is 100% more than 1/100 ($\frac{1/50-1/100}{1/100} \times 100\% = +100\%$) and 1/150 is 33⅓% less than 1/100 ($\frac{1/150-1/100}{1/100} \times 100\% = -33\frac{1}{3}\%$).

mentary-school-teachers' arithmetic text, cautions against plaintiffs' pitfall. For the benefit of the Court, I provide the correct computations for plaintiffs' analyses in Tables 1 and 2. This is done for reference only since, quite apart from these numerical results, plaintiffs' methods themselves are not valid as applied to the Board.

TABLE 1

Plaintiffs' Method 4 Analysis

			Deviation from Average	
Borough	Population	Share	Plaintiffs' Values	Correct Values*
Brooklyn	2,230,936	.000000448	—57.7%	— 36.6%
Queens	1,891,325	.000000538	—33.7%	— 25.2%
Manhattan	1,427,533	.0000007	—	— 0.9%
Bronx	1,169,115	.000000855	+17.4%	+ 21.0%
Staten Island	352,121	.00002839	+75.2%	+301.6%

* Values also include correction of minor rounding errors in Plaintiffs' "share" values.

TABLE 2

Plaintiffs' Method 5 Analysis

				Deviation from Average	
Borough	Citywide Share	Borough Share	Total Share	Plaintiffs' Values	Correct Values*
Brooklyn	.000000848	.000000448	.000001296	—20%	— 16.6%
Queens	.000000848	.000000528	.000001376	—13%	— 11.5%
Manhattan	.000000848	.0000007	.000001548	— 0.4%	— 0.4%
Bronx	.000000848	.000000855	.000001703	— 8.7%	+ 9.5%
Staten Island	.000000848	.000002839	.000003687	—57.8%	+137.1%

* Value also include correction of minor rounding errors in plaintiffs' "share" values.

Affidavit of Frank V. Ponterio in Opposition to Plaintiffs' Motion for Summary Judgment

6. A most telling demonstration of plaintiffs' utter failure to comprehend the crucial factual issue before this Court is found in the footnote on page 42 of plaintiffs' memorandum of law. Plaintiffs state in criticism of my methodology that, for the case of a combined vote of 2 city-wide members and the Staten Island borough president for the mayorless Board, 350,000 citizens dominate the remaining 6.75 million, whereas my methodlogy shows an over-representation of only 6.83%. It is obvious immediately, of course, that plaintiffs have simply ignored the concurrent representation of the two city-wide members. It seems hardly necessary to point out that the method for accounting for the overlay of city-wide and borough representation is the single underlying mathematical issue before this Court. It is absurd to address this issue by ignoring it. But the absurdity of plaintiffs' reasoning does not end there. In the 40-vote plan proposed by plaintiffs there would be 19 districts, each with a population of about 350,000 and one representative. Each city-wide member would have 7 votes. On the mayorless version of this Board, there would be a total of 33 votes. A coalition of two city-wide members (14 votes) plus three districts (3 votes) achieves a majority. By plaintiffs' reasoning, 1.05 million citizens would dominate the remaining 6.02 million, although deviations are essentially zero. Furthermore, if all boroughs had identical populations (1.41 million) and one representative, as in my hypothetical ideal Board, 2 city-wide members plus one borough representative would achieve a majority of the mayorless Board. Plaintiffs would conclude that 1.41 million citizens dominate the remaining 5.66 million, even though every methodology ever devised would show constitutionally perfect apportionment.

Affidavit of Frank V. Ponterio in Opposition to Plaintiffs' Motion for Summary Judgment

7. Plaintiffs' contention that my methodology overweights city-wide votes demonstrates their lack of understanding of my methodology and a confusion of representation with voting power. My methodology simply compares aggregate city-wide representation on the actual Board against a hypothetical perfect standard for each voting combination that enables the Board to act. The fact is that I do not weight "votes" at all, I weight representation. Should this Court decide that the appropriate quantity to be analyzed is voting power, my methodology could be applied with but a single modification. The modification consists simply of weighing each city-wide member by the total population of the City, multiplied by 2 (to account for his 2 votes), and divided by 5 (so that, in the aggregate, the 3 city-wide members' weight is $\frac{6 \times 7{,}071{,}303}{5}$ and the 5 borough presidents' weight is 7,071,030, corresponding to the 6 to 5 ratio of total city-wide to total borough votes). Each borough president remains weighted by the population of his borough.

As with my inital methodology, every coalition which allows the Board to act is defined and for each such coalition the population-weighted city-wide and borough votes are summed to find weighted total votes. These weighted total votes are then compared with the corresponding weighted total votes which would result for the same coalition on the ideal Board, and the percent differences computed.

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As presently constituted, the full Board can act by (at least) votes of the following members:

SIMPLE MAJORITY (6 VOTES)

Case I:	2 city-wide	+ 2 boroughs
Case II:	1 city-wide	+ 4 boroughs
Case III:	3 city-wide	+ no boroughs

TWO-THIRDS MAJORITY (8 VOTES)

Case IV:	2 city-wide	+ 4 boroughs
Case V:	3 city-wide	+ 2 boroughs

THREE-FOURTHS MAJORITY (9 VOTES)

Case VI:	2 city-wide	+ 5 boroughs
Case VII:	3 city-wide	+ 3 boroughs

UNANIMOUS (11 VOTES)

Case VIII: 3 city-wide + 5 boroughs

On budget override matters, the vote of the Mayor is not counted. Either a simple majority or a two-thirds majority may be required. These majorities can be achieved by (at least) votes of the following members:

SIMPLE MAJORITY (5 VOTES)

Case IX:	2 city-wide	+ 1 borough
Case X:	1 city-wide	+ 3 boroughs
Case XI:	no city-wide	+ 5 boroughs

TWO-THIRDS MAJORITY (6 VOTES)

Case XII:	2 city-wide	+ 2 boroughs
Case XIII:	1 city-wide	+ 4 boroughs

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Exhibits 2 through 4 show every combination of votes (cases) of the full Board for simple majority, two-thirds majority, and three-fourths majority respectively. Also shown at the foot of each exhibit are averages of the percent differences for all cases, for all cases in which the associated majority is achieved, and for all threshold cases, i.e., cases in which the associated majority is just achieved. Exhibits 5 and 6 show respectively corresponding information for votes of the mayorless Board for simple majority and two-thirds majority votes. Tables 3, 4, 5, 6, and 7 present a summary of threshold cases from Exhibits 2 through 6.

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TABLE 3

SIMPLE MAJORITY

Case	Boroughs Voting Yes	Weighted Borough Votes	Weighted Total Votes	% Difference From Norm
	Bn+Q	4122261	9779085	— 15.25
	Bn+M	3658469	9315293	— 9.78
	Bn+Bx	3400051	9056875	— 6.74
	Bn+S	2583057	8239881	+ 2.89
I	Q+M	3318858	8975682	— 5.78
	Q+Bx	3060440	8717264	— 2.73
	Q+S	2243446	7900270	+ 6.89
	M+Bx	2596648	8253472	+ 2.73
	M+S	1779654	7436478	+ 12.36
	Bx+S	1521236	7178060	+ 15.41
	Bn+Q+M+Bx	6718909	9547321	— 12.52
	Bn+Q+M+S	5901915	8730327	— 2.89
II	Bn+Q+Bx+S	5643497	8471909	+ 0.16
	Bn+M+Bx+S	5179705	8008117	+ 5.62
	Q+M+Bx+S	4840094	7668506	+ 9.63
III	None	0000000	8485236	0.00

Bn–Brooklyn; Q–Queens; M–Manhattan; Bx–Bronx; S–Staten Island

Norm weighted total votes = 8485236

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TABLE 4

TWO-THIRDS MAJORITY

Case	Boroughs Voting Yes	Weighted Borough Votes	Weighted Total Votes	% Difference From Norm
	Bn+Q+M+Bx	6718909	12375733	— 9.39
	Bn+Q+M+S	5901915	11558739	— 2.17
IV	Bn+Q+Bx+S	5643497	11300321	+ 0.12
	Bn+M+Bx+S	5179705	10836529	+ 4.22
	Q+M+Bx+S	4840094	10496918	+ 7.22
	Bn+Q	4122261	12607497	— 11.44
	Bn+M	3658469	12143705	— 7.34
	Bn+Bx	3400051	11885287	— 5.05
	Bn+S	2583057	11068293	+ 2.17
V	Q+M	3318858	11804094	— 4.33
	Q+Bx	3060440	11545676	— 2.05
	Q+S	2243446	10728682	+ 5.17
	M+Bx	2596648	11081884	+ 2.05
	M+S	1779654	10264890	+ 9.27
	Bx+S	1521236	10006472	+ 11.55

Bn–Brooklyn; Q–Queens; M–Manhattan; Bx–Bronx; S–Staten Island

Norm weighted total votes = 11313648

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TABLE 5

THREE-FOURTHS MAJORITY

Case	Boroughs Voting Yes	Weighted Borough Votes	Weighted Total Votes	% Difference From Norm
VI	Bn+Q+M+Bx +S	7071030	12727854	0.00
	Bn+Q+M	5549794	14035030	— 10.27
	Bn+Q+Bx	5291376	13776612	— 8.24
	Bn+Q+S	4474382	12959618	— 1.82
	Bn+M+Bx	4827584	13312820	— 4.60
VII	Bn+M+Bx	4010590	12495826	+ 1.82
	Bn+Bx+S	3752172	12237408	+ 3.85
	Q+M+Bx	4487973	12973209	— 1.93
	Q+M+S	3670979	12156215	+ 4.49
	Q+Bx+S	3412561	11897797	+ 6.52
	M+Bx+S	2948769	11434005	+ 10.17

Bn–Brooklyn; Q–Queens; M–Manhattan; Bx–Bronx; S–Staten Island

Norm weighted total votes = 12727854

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TABLE 6

SIMPLE MAJORITY—MAYORLESS BOARD

Case	Boroughs Voting Yes	Weighted Borough Votes	Weighted Total Votes	% Difference From Norm
	Bn	2230936	7887760	— 11.55
	Q	1891325	7548149	— 6.75
IX	M	1427533	7084357	— 0.19
	Bx	1169115	6825939	+ 3.47
	S	352121	6008945	+ 15.02
	Bn+Q+M	5549794	8378206	— 18.49
	Bn+Q+Bx	5291376	8119788	— 14.83
	Bn+Q+S	4474382	7302794	— 3.28
	Bn+M+Bx	4827584	7655996	— 8.27
X	Bn+M+S	4010590	6839002	+ 3.28
	Bn+Bx+S	3752172	6580584	+ 6.94
	Q+M+Bx	4487973	7316385	— 3.43
	Q+M+S	3670979	6499391	+ 8.08
	Q+Bx+S	3412561	6240973	+ 11.74
	M+Bx+S	2948769	5777181	+ 18.30
XI	Bn+Q+M+Bx +S	7071030	7071030	0.00

Bn–Brooklyn; Q–Queens; M–Manhattan; Bx–Bronx; S–Staten Island

Norm weighted total votes = 7071030

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TABLE 7

TWO-THIRDS MAJORITY—MAYORLESS BOARD

Case	Boroughs Voting Yes	Weighted Borough Votes	Weighted Total Votes	% Difference From Norm
	Bn+Q	4122261	9779085	—15.25
	Bn+M	3658469	9315293	— 9.78
	Bn+Bx	3400051	9056875	— 6.74
	Bn+S	2583057	8239881	+ 2.89
	Q+M	3318858	8975682	— 5.78
	Q+Bx	3060440	8717264	— 2.73
	Q+S	2243446	7900270	+ 6.89
	M+Bx	2596648	8253472	+ 2.73
	M+S	1779654	7436478	+12.36
	Bx+S	1521236	7178060	+15.41
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	Bn+Q+M+S	5901915	8730327	— 2.89
	Bn+Q+Bx+S	5643497	8471909	+ 0.16
	Bn+M+Bx+S	5179705	8008117	+ 5.62
	Q+M+Bx+S	4840094	7668506	+ 9.63

Bn–Brooklyn; Q–Queens; M–Manhattan; Bx–Bronx; S–Staten Island

Norm weighted total votes = 8485236

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Table 8 summarizes both average and maximum percent differences. As expected, the percent differences are higher than with my initial methodology. Nevertheless, average differences are still small and maximum differences are far less than those claimed in plaintiffs' analyses, again illustrating the ameliorating effect of dominant city-wide representation.

TABLE 8

		Average % Differences			Maximum % Differences (All Achieved Cases)	
	Majority Required	Threshold Cases	All Achieved Cases	All Cases	Over Represented	Under Represented
Full Board	1/2	7.26	6.01	9.19	+15.41	—15.25
	2/3	5.19	4.59	9.19	+11.55	—11.44
	3/4	4.13	3.80	9.19	+10.17	—10.27
Mayorless Board	1/2	8.86	7.26	5.72	+18.30	—18.49
	2/3	7.11	6.17	5.72	+15.41	—15.25

All percent deviations are within about ±15% for the full Board and about ±18% for the mayorless Board. For the vast majority of cases, the percent differences are within much smaller limits, as shown in Table 9.

TABLE 9

	Majority Required	Number of Achieved Cases	Differences within ±10%		Differences within ±12%	
			Number	%	Number	%
Full Board	1/2	128	102	79.7	110	85.9
	2/3	44	40	90.9	44	100
	3/4	19	17	89.5	19	100
Mayorless Board	1/2	64	46	71.9	50	78.1
	2/3	38	30	78.9	31	81.6
Totals		293	235	80.2	254	86.7

8. The validity of my methodology may perhaps be more clearly appreciated by examining it from an alternative perspective. Instead of hypothesizing a Board for use as a standard which has Boroughs with equal populations and equal votes, I can define a Board with populations as they actually exist and borough votes weighted exactly proportioned to those populations. Thus defined, this standard Board would consist of three city-wide members, each with two votes and five borough presidents with votes weighted as follows:

Brooklyn	—	1.5775184
Queens	—	1.3373759
Manhatan	—	1.0094237
Bronx	—	0.82669357
Staten Island	—	0.24898848
Total	—	5

The borough weighted votes are obtained by multiplying the ratios of borough to city population by 5 (e.g., for Brooklyn, $2{,}230{,}936 \div 7{,}071{,}030 \times 5 = 1.5775184$ votes). It should be noted that every analysis method proposed by plaintiffs would indicate perfect apportionment for such a Board, and the ratio of total city-wide to total borough votes remains at 6:5 as with the actual Board. Total city-wide + borough votes for this standard Board, for each coalition enabling the Board to act (as defined in Tables 3 through 7) are compared with the corresponding total votes on the actual Board. I then compute percent differences. This methodology is mathematically identical to the methodology described in paragraph 7 and yields precisely the same results. Table 10 shows the results for

a simple majority of the full Board. By comparing this table with Table 3, the equivalence of the two methodologies is evident (mathematically this may be seen by observing that weighted votes entries in Table 3 are all equal to the corresponding entries in Table 10 multiplied by 1,414,206, the population of my ideal borough). This alternative perspective shows my methodology to be equivalent to the initial method described by plaintiffs in their Complaint, except that I avoid any arbitrary allocation of city-wide votes among the boroughs by analyzing city-wide rather than borough totals.* It is this avoidance of both city-wide vote allocation and subsequent focusing on borough rather than city-wide totals which is the key to a proper evaluation of the overlay of city-wide and borough representation. (Plaintiffs are fond of saying that I concentrate on boroughs. Of course, exactly the reverse is true. I analyze only city-wide totals while plaintiffs analyze only borough totals). Logic and common sense dictate that if the overlay of city-wide and borough representation is to be analyzed, the methodology for doing so must preserve, not chop up, that overlay.

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* And, unlike plaintiffs, I compute percents correctly.

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TABLE 10

SIMPLE MAJORITY

Case	Boroughs Voting Yes	Weighted Borough Votes	Weighted Total Votes	% Difference From Norm
	Bn+Q	2.9148943	6.9148943	—15.25
	Bn+M	2.5869421	6.5869421	— 9.78
	Bn+Bx	2.404212	6.404212	— 6.74
	Bn+S	1.8265069	5.8265069	+ 2.89
I	Q+M	2.3467996	6.3467996	— 5.78
	Q+Bx	2.1640695	6.1640695	— 2.73
	Q+S	1.5863644	5.5863644	+ 6.89
	M+Bx	1.8361173	5.8361173	+ 2.73
	M+S	1.2584122	5.2584122	+12.36
	Bx+S	1.0756821	5.0756821	+15.41
	Bn+Q+M+Bx	4.7510115	6.7510115	—12.52
	Bn+Q+M+S	4.1733064	6.1733064	— 2.89
II	Bn+Q+Bx+S	3.9905763	5.9905763	+ 0.16
	Bn+M+Bx+S	3.6626241	5.6626241	+ 5.62
	Q+M+Bx+S	3.4224816	5.4224816	+ 9.63
III	none	0	0	0.00

Norm = 6 votes

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This alternative perspective also demonstrates that my methodology is overly conservative in its quantification of voting power percent differences. It can easily be seen that with the exact weighted borough votes defined above, no one borough has two or more votes, no combination of two boroughs has three or more votes, and no combination of three boroughs has four or more votes. This means that none of the voting coalitions enabling the Board to act which are indicated as underrepresented (negative % differences) would be affected even if borough votes were exactly weighted according to borough populations. For example in Case I coalitions, even the most populous borough, Brooklyn, could not alone achieve a majority vote in combination with the votes of two city-wide members. This signifies that for all coalitions which are shown as underrepresented, the underrepresentation is more apparent than real. From a voting power perspective, all underrepresented cases should be treated as having zero percent differences. "Real" voting power malapportionment is limited to overrepresented cases. For example, with one vote each, Bronx and Staten Island could form an effective coalition in Case I. With population-weighted votes, they could not (total vote would be 5.0756821 vice 6 votes required). In terms of real voting power, the spreads between most overrepresented and most underrepresented cases are about halved. This results in spreads essentially the same as (actually somewhat less than) those computed for my initial methodology based on representation as the measure of apportionment. Perhaps better than any other, this analysis approach demonstrates the blending of majority control and minority representation

Affidavit of Frank V. Ponterio in Opposition to Plaintiffs' Motion for Summary Judgment

that the Court of Appeals recognized as a legitimate objective.

/s/ Frank V. Ponterio
Frank V. Ponterio
766 Pelton Avenue
Staten Island, N.Y. 10310
(212) 981-7953

Dated: January 24, 1984
Staten Island, N.Y.

Sworn to before me this 24th day of January, 1984

/s/ Mary T. Brosnan
Notary Public

Plaintiffs' Statement of Facts Pursuant to Local Rule 3(g), filed June 7, 1984

UNITED STATES DISTRICT COURT

Eastern District of New York

81-CV-3920 (E.R.N.)

Morris, et al.,

Plaintiffs,

—against—

The Board of Estimate, et al.,

Defendants,

—and—

Ponterio, et al.,

Intervenors.

The following is a statement of the facts which plaintiffs believe to be undisputed, which entitle plaintiffs to summary judgment:

1. Plaintiffs are residents and registered voters in Brooklyn, New York.

2. The Board of Estimate is a body of New York City municipal government authorized by Chapter 3 of the New York City Charter. The Board of Estimate is comprised of the Mayor, City Council President, Comptroller and the five borough presidents of the City of New York.

3. The City of New York is the local municipal entity which is governed, in part, by the defendant Board of Estimate.

Statement of Facts Pursuant to Local Rule 3(g)

4. Edward I. Koch, Carol Bellamy and Harrison J. Goldin are respectively Mayor, City Council President and Comptroller of the City of New York. These elected officials hold citywide offices and each of these officials was elected to his/her office in the last citywide election. Under the New York City Charter each of these office holders is entitled to two votes out of the total of eleven votes allocated to the membership of the Board of Estimate.

5. Howard Golden, Borough President of Kings County; Andrew Stein, Borough President of New York County; Stanley Simon, Borough President of Bronx County; Donald Manes, Borough President of Queens County; and Anthony Gaeta, Borough President of Richmond County, are the five borough presidents of the boroughs of the City of New York. Each of these officials was elected by voters in each of their respective boroughs in the last countywide elections. Under the New York City Charter, each of the borough presidents is entitled to one vote out of the total of eleven votes which are allocated to the members of the Board of Estimate.

6. The Board of Estimate is comprised of the three defendant citywide officials whom the City Charter grants two votes each, and the five defendant borough presidents who are granted one vote each.

7. The Board of Estimate of the City of New York is a governmental body which is authorized by the New York City Charter, to exercise certain governmental powers which include but are not limited to the following:

A. The Board of Estimate exclusively

i. determines the use, development and improvement of property owned by the City;

Statement of Facts Pursuant to Local Rule 3(g)

ii. approves standards, scopes and final designs of capitol projects for the City;

iii. negotiates and enters into all contracts on behalf of the City;

iv. negotiates and approves all franchises that are granted by the City;

v. grants leases of City property and enters into leases of property for City use;

vi. sets the rates for purchases of water from the City;

vii. sets the charges for sewer services provided by the City; and

viii. approves or modifies all zoning decisions for the City;

ix. sets tax abatements.

B. The Board of Estimate acting in conjunction with the New York City Council

i. recommends and approves the expense budget of the City without the participation of the Mayor;

iii. periodically modifies the budgets of the City;

iv. confers with the City Council when agreement on the budget between the two bodies is not reached;

v. overrides mayor vetoes of budget items without the participation of the Mayor; and

vi. holds hearings on budgetary matters.

C. The Board of Estimate also

i. administers the Bureau of Franchises;

ii. administers the Bureau of the Secretary;

iii. holds public hearings on any matter of City policy within its responsibilities whenever called upon to do so by the Mayor or in its discretion for the public interest;

iv. holds hearings on tax abatements that are within the discretion of City administrative agencies; and

v. makes recommendations to the Mayor or City Council in regard to any matter of City policy.*

8. The Board of Estimate is the only municipal body in New York City government which requires New York City's Mayor, Comptroller, City Council President and Borough Presidents to meet regularly and vote together upon issues which concern the governing of New York City.

9. The Board of Estimate's powers, functions and official activities constitute the exercise of general governmental powers.

10. The Board of Estimate's activities affect the geographic areas coexistensive with New York City.

11. The population of the City of New York is 7,071,030.

* For a complete list of the Board of Estimate's powers with reference to Charter and Administrative Code provisions, see Appendix A to Exhibit A (the Kramarsky Study) which is hereby incorporated herein by reference.

12. The population of each borough of the City of New York is as follows:

Brooklyn	2,230,936
Queens	1,891,325
Manhattan	1,427,533
Bronx	1,169,115
Staten Island	532,121

13. Measuring deviations from a norm of representation by separating the representation of the borough presidents from representation of the citywide Board representatives, the deviations by borough are as follows:

Borough	*Population*	*Deviation from the Average*
Brooklyn	2,230,936	—57.7%
Queens	1,891,325	—33.7%
Manhattan	1,427,533	— 0.9%
Bronx	1,169,115	+17.4%
Staten Island	532,121	+75.2%

The extreme deviation is ±132.9%.

14. Cumulating representation by the borough and citywide Board representatives, the deviations from the norm population per vote inherent in the present representation scheme on the Board of Estimate are as follows:

Brooklyn	—20.1%
Queens	—13.2%
Manhattan	— .5%
Bronx	+ 8.6%
Staten Island	+57.9%

The extreme deviation from a norm of representation on the Board of Estimate is +78%.

Statement of Facts Pursuant to Local Rule 3(g)

15. The measure of the citizens' share by borough in their borough president is as follows:

Borough	*Population*	*Share*	*Deviation from Average*
Brooklyn	2,230,936	.000000448	—57.7%
Queens	1,891,325	.000000528	—33.7%
Manhattan	1,427,533	.0000007	— 0.9%
Bronx	1,169,115	.000000855	+17.4%
Staten Island	532,121	.000002839	+75.2%

The extreme deviation if ±132.9%

16. The measure of the citizens' share by borough in their cumulative representation on the Board of Estimate is as follows:

Borough	*Citywide Share*	*Borough Share*	*Total Share*	*Deviation from Average*
Brooklyn	.000000848	.000000448	.000001296	—20%
Queens	.000000848	.000000528	.000001376	—13%
Manhattan	.000000848	.0000007	.000001548	— 0.4%
Bronx	.000000848	.000000855	.000001703	+ 8.7%
Staten Island	.000000848	.000002839	.000003687	+57.8%

The extreme deviation is ±78%.

17. New York City's population includes many and diverse racial and ethnic groups:

White	61%
Black	25%
Asian & Other	14%
Hispanic	20%

18. United States' census data show the following breakdown by borough:

Statement of Facts Pursuant to Local Rule 3(g)

	Brooklyn	*Queens*	*Manhattan*	*Bronx*	*Staten Island*
White	56%	71%	59%	47%	89%
Black	42%	19%	22%	32%	7%
Asian & Others	12%	10%	19%	21%	4%
Hispanic	18%	14%	24%	34%	5%

18. The boroughs of Bronx, Queens, Brooklyn, and Manhattan each contain numerous identifiable demographically homogenous neighborhoods. Within each borough there exist neighborhoods which are each demographically dissimilar to one another.

19. There have been five members of racial minority groups who sat on the Board of Estimate.

20. The primary duty of the borough president is to sit on the Board of Estimate. The borough presidents' powers and duties are included in Chapter 4 of the City Charter.

21. Under the present system of representation mandated by sections 61, 62, 120 and 222 of the New York City Charter for the Board of Estimate, representatives of 41.7% of the population of the City of New York can control a majority of votes on every budget measure.

Respectfully submitted,

/s/ Richard Emery
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Dated:

Plaintiffs' Joint Statement on Issues to Be Decided, filed June 7, 1984

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81-CV-3920 (E.R.N.)

MORRIS, et al.,

Plaintiffs,

—against—

THE BOARD OF ESTIMATE, et al.,

Defendants,

—and—

PONTERIO, et al.,

Intervenors.

The Second Circuit Court of Appeals remanded this case, directing this Court 1) to decide upon a methodology for analyzing the apportionment of the Board; 2) to determine the degree of malapportionment, if malapportionment exists; and to rule on the policies and interests which the Supreme Court has held may justify deviations from the literal one person, one vote formula.

In accordance with that directive the undersigned parties agree that the issues presented to this Court should be bifurcated. At this juncture we believe that the Court need only decide the first and second questions posed by the Second Circuit; namely, the appropriate method for measuring apportionment and the degree of malapportionment if that exists. In this regard the following issues must be resolved:

Joint Statement on Issues to Be Decided

1. Whether, as plaintiffs contend, the Board of Estimate is malapportioned under either the *Abate* test, or an analysis of the individual citizen's share of representation or as a result of the equal votes of the respective borough presidents in light of the variations in population between the five boroughs;

2. Whether, as City defendants contend, the presence and votes of the three city-wide members on the Board renders it incapable of analysis under the traditional quantitative approaches suggested by plaintiffs and whether a qualitative approach is appropriate;

3. Whether one or both of the mathematical methods proposed by intervenor-defendant Ponterio demonstrate that percent departures from strict per capita apportionment comply with constitutional one person, one vote requirements;

4. Whether, as intervenor-defendant Straniere contends, intervenor-defendant Ponterio's analysis is appropriate.

The undersigned agree that the above questions are issues of law which can be resolved without an evidentiary hearing.

In the event that the Court adopts the City defendants' qualitative approach to analyzing the Board's structure, plaintiffs believe an evidentiary hearing is required on the issue of whether local community interests are prejudiced by the Board's present representational scheme.

In suggesting a judicial inquiry into the issues recited above the parties recognize that a second set of issues may need to be resolved if, at the close of the initial inquiry, the Court concludes that malapportionment exists under

any of the above-identified analytical models. If the Court finds apportionment it must then inquire into any legally acceptable justification for the degree of deviation found to exist in the composition of the Board of Estimates. We agree, however, that the Court should conduct an inquiry into the methodological and apportionment issues before reaching these secondary issues regarding justifications.

/s/ Richard Emery
Richard Emery
New York Civil Liberties Union
84 Fifth Avenue
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Attorney for Plaintiffs

Frederick A.O. Schwarz, Jr.
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100 Church St., Rm. 6C26
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212-566-2139
By: /s/
Susan Rosenberg
Assistant Corporation Counsel

Frank Ponterio
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Intervenor

Robert Straniere
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Staten Island, N.Y. 10306
Intervenor

Joint Stipulation of Policies and Interests Served by the Board of Estimate, dated October 18, 1984

UNITED STATES DISTRICT COURT

Eastern District of New York

81 Civ. 3920 (ERN)

Beverly Morris; Joy Clarke Holmes;
Joanne Oplustil,

Plaintiffs,

—against—

The Board of Estimate, The City of New York, Edward I. Koch, individually and as Mayor of New York, Carol Bellamy, individually and as City Council President, Harrison J. Goldin, individually and as Comptroller for the City of New York, Howard Golden, Andrew Stein, Stanley Simon, Donald Manes, Anthony Gaeta, each individually and as Borough Presidents of the boroughs of the City of New York,

Defendants,

—and—

Frank V. Ponterio,

Intervenor-Defendant,

Robert A. Straniere, individually and as a member of the New York State Assembly,

Intervenor-Defendant.

Pursuant to this Court's order dated August 21, 1984, the parties hereto submit to the Court this joint stipulation for submission listing:

Joint Stipulation of Policies and Interests

1. those *agreed* valid policies and interests presently served by the Board; and
2. those *disputed* policies and interests which at least one defendant maintains are valid and are presently served by the Board.

Policies and interests asserted by one or more defendants follow paragraph numbers. After each such policy, plaintiffs' response is set forth.

1. *Defendants' asserted interest:*

Absence of any demonstrable injury to the populations of the more heavily populated boroughs as a consequence of requiring equal votes among the boroughs, particularly in light of the presence on the Board of three members—the Mayor, the Comptroller and the City Council President—who are elected by all the voters in all the boroughs, who each have two votes, and who in the aggregate outvote the five borough presidents.

Plaintiffs' response:

Plaintiffs cannot agree. Based on findings of this Court in its August 24, 1984, opinion determining ± 133% voting dilution, direct prejudice to individual voters of the larger boroughs under applicable Supreme Court precedent is plain. Further, if necessary, it can be demonstrated that the smaller boroughs have benefitted unduly as a result of equal voting power with the larger boroughs. Finally, as this Court concluded, the presence of the citywide officials on the Board does not mitigate the voting strength dilution inherent in the present Board structure.

Joint Stipulation of Policies and Interests

2. *Defendants' asserted interest:*

Uniqueness of the Board as a form of local government because of its composition and voting allocation.

Plaintiffs' response:

Plaintiffs are unable to agree with this proposition because we do not understand what defendants' mean by "uniqueness" and we are, therefore, uncertain as to how defendants claim that the "uniqueness" of the Board advances any governmental interest. Plaintiffs note that many other cities have "unique" governing institutions which conform with one person, one vote structures and serve similar functions as the Board of Estimate.

3. *Defendants' asserted interest:*

Meaningful representation of the citizens of the lesser populated boroughs, especially Staten Island, in Board affairs.

Plaintiffs' response:

Plaintiffs are again unable to agree with this proposition because we do not understand what defendants mean by "meaningful representation." Plaintiffs agree that our system of representative democracy is well served when governmental institutions are structured to provide "meaningful representation" of the will of the people. Plaintiffs have consistently contended that the present structure of the Board of Estimate provides for "meaningful representation" only for the citizens of Staten Island. Considerably more "meaningful representation" by any definition could be far more effectively accomplished by a Board recon-

stituted in a form which complied with one person, one vote strictures.

4. *Defendants' asserted interest:*

Preservation of the boroughs as legitimate representational entities in local government.

Plaintiffs' response:

Plaintiffs agree, except for the word "legitimate." It is plaintiffs' contention that the borough as an entity is a historical anomaly from which virtually all power has eroded and that in so far as its continued existence as a governmental entity precludes representation consistent with one person, one vote structures, it does not constitute a legitimate reason for diluting voting power.

5. *Defendants' asserted interest:*

Use of natural and historical borough boundaries to define representational entities in local government.

Plaintiffs' response:

Plaintiffs agree to the extent that the present scheme does look to historical borough boundaries and perhaps even natural boundaries.* It is also plaintiffs' position that alternative representational schemes could both preserve natural and historical borough boundaries and comply with one person, one vote.

---

* We are uncertain as to whether the dividing line between Brooklyn and Queens rests upon a natural boundary or whether the division is purely a function of historical development.

6. *Defendants' asserted interest:*

Historical treatment of the boroughs as separate governmental entities.

Plaintiffs' response:

This proposition seems no different from the proposition advanced in the preceding paragraph. As to both propositions 5 and 6 as advanced by the defendants, we urge that the historical role of the borough as primary governmental authority in the City has long since passed. Any remaining role of the borough governments can be adequately accommodated in a reconstituted Board which complies with one person, one vote.

7. *Defendants' asserted interest:*

Necessity of retaining borough representation on the Board in light of abolition of such representation on the City Council.

Plaintiffs' response:

Plaintiffs dispute that claim. Local interests are well represented by the present structure of the City Council. The City Council's structure as a result of this Court's ruling only demonstrates the primacy of one person, one vote interests over borough interests. To the extent that borough interests remain important, a reconstituted Board structure which complies with one person, one vote can accommodate such interests.

8. *Defendants' asserted interests:*

Effectiveness of a Board comprised of only eight members.

Joint Stipulation of Policies and Interests

Plaintiffs' response:

Plaintiffs are unable to agree with this proposition because, again, we do not know what it means. We are unsure as to whether in using the word "effectiveness," defendants mean to use the word "efficiency." And if so, we do not know whether defendants mean, by this proposition, to contend that a board is more efficient with eight members than it would be with eighteen or than it would be with five. It is not clear to us whether defendants are contending that eight is the ideal number from the standpoint of efficiency or effectiveness. Plaintiffs do concede that the Board as presently constituted efficiently and effectively overrepresents the small boroughs and underrepresents the large boroughs. A Board reconstituted to comply with one person, one vote could be far more effective to represent fairly all the people of the City.

9. *Defendants' asserted interest:*

The long-standing dual role of borough representatives as both Borough President and the member of the Board.

Plaintiffs' response:

This proposition by the defendants seems to be merely a restatement of the contention asserted in paragraphs five and six above. So understood, our response to it remains the same as that which we presented above. Essentially that is that the borough presidents only remaining power of any significance is their role as Board of Estimate representative. A Board reconstituted in compliance with one person, one vote could just as well accommodate the dual role of borough presidents, to the extent that such a role remains.

Joint Stipulation of Policies and Interests

10. *Defendants' asserted interest:*

Coordination of City and borough governmental authority and responsibility.

Plaintiffs' response:

Plaintiffs cannot agree with this statement as there is virtually no remaining significant borough government authority. Moreover, a Board reconstituted consistent with one person, one vote rules could accommodate coordination of the few remaining borough government powers with centralized City authority.

11. *Defendants' asserted interest:*

Ability to balance differing interests and needs, and to accommodate development and long-term planning requirements of both the boroughs and the City as a whole.

Plaintiffs' response:

Plaintiffs agree, however, a Board reconstituted to comply with one person, one vote structures could far better serve this function as it would more accurately reflect the interests of the people of the City.

12. *Defendants' asserted interest:*

Flexibility to meet changing societal needs, particularly in a large municipality whose local government is complex.

Plaintiffs' response:

It is difficult to agree with this proposition as it is so undefined and ambiguous. It is clear, however, that a

Board reconstituted to comply with one person, one vote structures could far better serve this function as it would more accurately reflect the interests of the people of the City.

13. *Defendants' asserted interest:*

Correlation between the functions of the Board and the impact of those functions upon the boroughs, particularly in regard to the formulation of the capital budget, in order to assure that different parts of the City get their fair share of service contracts and capital budget allocation which might otherwise go to those portions of the City contributing the most tax dollars.

Plaintiffs' response:

Plaintiffs agree, however, we note that under the present Board structure the smaller boroughs obtain more than their allotted share by population, and that a Board reconstituted to comply with one person, one vote structures could far better serve this function as it would more accurately reflect all the people's interests.

14. *Defendants' asserted interest:*

Necessity and effectiveness of borough representation in local government as an intermediate size entity, with citywide representation being larger and community board representation being smaller.

Plaintiffs' response:

Plaintiffs dispute this proposition. No such interest is anywhere found in the City Charter or City history. Local interests must be represented, however, "borough interests" and local interests are rarely, if ever, synonymous. Most often "borough interests" cannot be identified because borough interests are comprised by many conflicting local interests within each borough. Therefore, the identification of something called "borough interests" as intermediate to citywide and local interests is impossible and not a plausible justification for maintaining the present structure of the Board.

15. *Defendants' asserted interest:*

Ability of the Board as presently constituted to eliminate undue concentration of executive power and to supplement the City Council, which retains the general legislative power of the City.

Plaintiffs' response:

Plaintiffs agree, however, there is no reason why a Board of Estimate that is balanced from the standpoint of one person, one vote is necessary to achieve this interest.

Statement of Plaintiffs:

None of the interests advanced by defendants, even if such interests were genuine, could justify deviations of $\pm$ 133%. No interest can support dilution of an individual voter's right to exercise an equally weighted vote at this degree of disparity of voting power. It is exactly for this reason that the Supreme Court has refrained from entering the "political thicket." Identification of such interests as those described above is ambiguous and inexact. Moreover, such interests are irrelevant to the basic value of the right of an individual voter to be assured of a vote

equal in strength to his neighbor. Finally, there is no interest asserted above which cannot be equally well served by a Board reconstituted to conform with one person, one vote requirements.

Dated: New York, New York
October 18, 1984

/s/

Richard D. Emery
Arthur Eisenberg
New York Civil Liberties Union
84 Fifth Avenue
New York, New York 10011
(212) 924-7800

Counsel for Plaintiffs

/s/

Susan Rosenberg on behalf of
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Counsel for Defendants

Letter from Frank V. Ponterio to Edward R. Neaher, District Judge, dated October 22, 1984

FRANK V. PONTERIO
Attorney at Law
766 Pelton Avenue
Staten Island, N.Y. 10310
Tel. (212) 981-7953

October 22, 1984

Hon. Edward R. Neaher
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Morris v. Board of Estimate
81 Civ. 3920

Dear Judge Neaher:

Pursuant to your August 21, 1984 order, I submitted to the Corporation Counsel for the City of New York, by letter dated September 24, 1984, a list of ten policies and interests I claim are presently served by the Board of Estimate. These ten policies and interests were included in a proposed joint stipulation prepared by the Corporation Counsel as coordinator for defendants and submitted for my concurrence. I communicated by telephone my concurrence with the proposed stipulation, as submitted, to Susan Rosenberg, assistant Corporation Counsel.

Without notice, prior consultation, or agreement, the Corporation Counsel subsequently revised the proposed stipulation before submitting it for response to Richard Emery, counsel for plaintiffs. The revision includes deletion of two policies and interests proposed by me and a

Letter from Frank V. Ponterio to Hon. Edward R. Neaher

change in wording of another. Both the deletions and the wording change seriously prejudice arguments I intend to make to this Court and possibly on appeal of this case. Moreover, neither I nor intervenor-defendant Straniere were offered an opportunity to review and sign the completed joint stipulation filed with this Court on October 19, 1984.

I respectfully request that I be permitted to submit a supplement to the already filed joint stipulation restoring the two deleted items and the original wording of the third item. A copy of my proposed supplement is enclosed. I have, by copy of this letter, forwarded this supplement to counsel for all parties. I believe that no party will be prejudiced even if submission of the proposed supplement with plaintiffs' response delays these proceedings by a few more days.

Respectfully yours,

/s/ Frank V. Ponterio
Frank V. Ponterio, pro se
Intervenor-defendant

cc: Richard Emery, Esq.
F. A. O. Schwarz, Esq.
Susan Rosenberg, Esq.
Hon. Robert Straniere

So Ordered:

/s/ Edward R. Neaher
Edward R. Neaher
U.S. District Judge

Dated: 10-29-84

Order of Edward R. Neaher, District Judge, dated October 29, 1984

UNITED STATES DISTRICT COURT

Eastern District of New York

81 Civ. 3920 (ERN)

Beverly Morris, Joy Clarke Holmes, Joanne Oplustil,

Plaintiffs,

v.

The Board of Estimate, The City of New York, Edward I. Koch, individually as a Mayor of New York, Carol Bellamy, Individually and as City Council President, Harrison J. Goldin, Individually and as Comptroller for the City of New York, Howard Golden, Andrew Stein, Stanley Simon, Donald Manes, Anthony Gaeta, each individually and as Borough Presidents of the City of New York,

Defendants.

—and—

Frank V. Ponterio,

Intervenor-Defendant,

Robert A. Strainiere, individually and as a member of the New York State Assembly,

Intervenor-Defendant.

Pursuant to this Court's order dated August 21, 1984, the parties hereto submit to the Court this supplemental joint stipulation for submission listing:

Order of Edward R. Neaher, District Judge

1. those *agreed* valid policies and interests presently served by the Board; and
2. those *disputed* policies and interests which at least one defendant maintains are valid and are presently served by the Board.

AGREED VALID POLICIES AND INTERESTS PRESENTLY SERVED BY THE BOARD

16. Effectuation of delegated police-power responsibilities.*
17. Equality of voting power on the Board among the boroughs, as boroughs.*
18. Meaningful participation by the citizens of the lesser populated boroughs, especially Staten Island, in Board affairs.**

* Omitted from Joint Stipulation dated October 18, 1984.

** Added to restore intended wording of paragraph numbered 3 of Joint Stipulation dated October 18, 1984.

Plaintiffs' Supplemental Joint Stipulation of Policies and Interests Served by the Board of Estimate, dated January 9, 1985

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81 Civ. 3920 (ERN)

BEVERLY MORRIS; JOY CLARKE HOLMES; JOANNE OPLUSTIL,

Plaintiffs,

—against—

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of New York, CAROL BELLAMY, individually and as City Council President, HARRISON J. GOLDIN, individually and as Comptroller for the City of New York; HOWARD GOLDEN, ANDREW STEIN, STANLEY SIMON, DONALD MANES, ANTHONY GAETA, each individually and as Borough Presidents of the boroughs of the City of New York,

Defendants,

—and—

FRANK, V. PONTERIO,

Intervenor-Defendant,

ROBERT A. STRAINIERE, individually and as a member of the New York State Assembly,

Intervenor-Defendant.

Pursuant to this Court's order dated August 21, 1984, the parties hereto submit to the Court this supplemental joint stipulation for submission listing:

1. those *agreed* valid policies and interests presently served by the Board; and
2. Those *disputed* policies and interests which at least one defendant maintains are valid and are presently served by the Board.

Policies and interests asserted by one or more defendants follow paragraph numbers after each such policy plaintiffs' response is set forth:

Defendants' asserted interest

16. Effectuation of delegated police-power responsibilities.

Plaintiffs' response:

Police power responsibilities under the New York City Charter inhere in the City Council. Notwithstanding this fact, all exercise of power by the Board of Estimate may be handled as effectively and more fairly under a Board structured consistent with one person, one vote; for example, by a Board with weighted votes alloted to the borough presidents according to the relative populations of each borough or under a Banzhaf weighted voting scheme.

Defendants' asserted interest:

17. Equality of voting power on the Board among the boroughs as boroughs.

Plaintiffs' response:

It would seem that defendants' asserted interest is subsumed by the interests asserted by defendants previously

in statements 3, 4, 5, 6, 7, 13, and 14. Equality of voting between the borough presidents in and of itself without respect to any other value or interest or without respect to population differentials does not constitute a legally cognizable reason for deviating from strict one person, one vote dictates. One could just as easily assert that no reason need be provided for state legislative districts varying in size by ± 133% other than that they follow historical boundaries. Plaintiffs' entire case rests on the rejection of such an assertion.

Defendants' asserted interest:

18. Meaningful participation by the citizens of the lesser populated boroughs, especially Staten Island, in Board affairs.

Plaintiffs' response:

As with plaintiffs' response to asserted interest number 3, the change in wording from "representation" to "participation" does not alter the lack of clarity in this asserted interest. Restructing the system of "participation" in Board affairs to comply with one person, one vote doctrine, would not only guarantee Staten Island and the lesser populated boroughs a fair vote but it would also provide a fair voice for the citizens of Brooklyn and Queens. As the Board is presently structured, the voice of the citizens in the larger boroughs is diluted by their lack of equality with the far fewer citizens of Staten Island who each have six times the influence over their representative as compared to the citizens of Brooklyn. Even a restructured Board with a weighted voting scheme under a Banzhaf analysis, as is used in most County legislative bodies in New York, would more adequately address the disparities

extant in the present scheme which takes no account of population differences.

This supplemental stipulation is submitted in addition to the stipulation of October 18, 1984, and should in all respects be considered therewith.

Dated: January 9, 1985
New York, New York

/s/ Susan Rosenberg
Susan Rosenberg, Esq.
On Behalf of
F.A.O. Schwarz
Coporation Counsel
100 Church St.
New York, N.Y. 10007

Attorneys for Defendants

/s/ Richard Emery
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Attorneys for Plaintiffs

/s/ Frank V. Ponterio
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Intervenor-defendant *pro se*

/s/ Robert Straniere
Robert Straniere
182 Rose Ave.
Staten Island, N.Y. 10306

Intervenor-defendant *pro se*

Stipulation and Order of Edward R. Neaher, Distrct Judge, dated February 13, 1985

UNITED STATES DISTRICT COURT

Eastern District of New York

81 Civ. 3920 (ERN)

Beverly Morris, Joy Clarke Holmes, Jeanne Oplustil,

Plaintiffs,

v.

The Board of Estimate, The City of New York, Edward I. Koch, individually and as Mayor of New York, Carol Bellamy, Individually and as City Council President, Harrison J. Goldin, Individually and as Comptroller for the City of New York, Howard Golden, Andrew Stein, Stanley Simon, Donald Manes, Anthony Gaeta, each individually and as Borough Presidents of the City of New York,

Defendants.

Whereas, plaintiffs commenced this action on December 2, 1981, seeking *inter alia*, a judgment declaring unconstitutional as a violation of the one person, one vote doctrine the voting structure of the New York City Board of Estimate; and

Whereas, on January 14, 1982, defendants served and filed their answer to the complaint; and

Whereas, the Court granted without opposition the motions to intervene as defendants Frank V. Ponterio and

Stipulation and Order of Hon. Edward R. Neaher

Robert A. Straniere, respectivelly and the Court granted without opposition the motion to intervene as *Amicus Curiae* of John J. Marchi; and

WHEREAS on December 2, 1982, this Court denied plaintiffs' motion for summary judgment and granted defendants cross-motion for summary judgment on the ground that the Board of Estimate was not subject to the one person, one vote doctrine; and

WHEREAS, on May 16, 1983, the Second Circuit Court of Appeals reversed that decision and remanded this matter to the District Court, noting, *inter alia,* that "the fact that three members of the Board are elected at large from the entire City raises novel issues as to how an individual voter's opportunity to elect these members should be assessed in conjunction with his opportunity to elect his borough representative;" and

WHEREAS, on August 21, 1984, this Court issued a memorandum and order in which the Court excluded from its computation of malapportionment the presence of the three Citywide members of the Board and, based upon an examination of the population of the five boroughs, found that there exists on the Board of Estimate a 132.9% maximum deviation from population equality and directed the parties to file with the Court a joint stipulation of policies and interests served by the Board of Estimate; and

WHEREAS, said stipulation was filed with the Court on October 18, 1984 and was subsequently supplemented; and

WHEREAS, on October 31, 1984, this Court at a status conference proposed that a hearing should be had on the issue of whether there exists sufficient justification for the existence of a 132.9% maximum deviation; and

Stipulation and Order of Hon. Edward R. Neaher

WHEREAS, counsel for plaintiffs and defendants having conferred as to the appropriate course of action to take in order to expeditiously resolve this matter; and

WHEREAS, defendants submit that, subject to the possibility of eventual United States Supreme Court review of the decision of the United States Court of Appeals for the Second Circuit which held the one person, one vote doctrine applicable to the New York City Board of Estimate, one of the main issues in this case is whether the presence of the three Citywide members on the Board must be taken into acocunt in determining the degree of malapportionment, if any, existing on the Board, and one of the main issues in this case is whether the degree of malapportionment, if any, existing on the Board is justified by one or more of the policies and interests enumerated in the stipulation filed with this Court on October 18, 1984, as supplemented; and

WHEREAS, plaintiffs submit that the Court correctly excluded the presence of the three Citywide members in determining the degree of malapportionment existing on the Board; and that none of these policies and interests enumerated in the stipulation filed with this Court on October 18, 1984 as supplemented, nor any basis exists to justify the 132.9% deviation found by the Court; and submit alternatively that even if the three Citywide members are taken into account in determining the degree of malapportionment, the existing Board of Estimate scheme violates one person, one vote requirements; and

WHEREAS, the parties have filed a document with the Court entitled "Joint Stipulation of Policies and Interests served by the Board of Estimate" in which defendants recite asserted policies and interests in support of the present Board of Estimate scheme and plaintiffs respond

to each of those asserted policies and interests as set forth in the "Joint Stipulation", as supplemented; and

WHEREAS, the parties hereto are in agreement that a hearing calling for the presentation of oral testimony is not necessary at this time;

IT IS HEREBY STIPULATED AND AGREED AS FOLLOWS:

1. That at this time in place and instead of a hearing the parties including amicus curiae will proceed by affidavits and memoranda of law on the policies and interests which may justify deviations from the one person, one vote formula .

2. All parties agree that defendants, intervenors, and amicus curiae shall be permitted to submit further papers within 30 days after this Court approves this stipulation and the parties receive actual notification of such approval; thereafter, within 20 days plaintiffs may respond by further written submissions on the issues raised by defendants including amicus curiae, and defendants including amicus curiae shall be permitted to reply within ten days thereafter to the plaintiffs' submissions.

3. Further, no party or amicus curiae will request a hearing unless such party or amicus curiae can demonstrate that some matter set forth in the submissions is unusual and not amenable to clarification by written submission.

/s/ RICHARD D. EMERY
RICHARD D. EMERY
New York City Liberties Union
Attorney for Plaintiffs
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/s/ FREDERICK A.O. SCHWARZ, JR.
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/s/ FRANK V. PONTERIO
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/s/ ROBERT STRANIERE
ROBERT STRANIERE
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182 Rose Avenue
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/s/ JOHN MARCHI
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358 St. Marks Place
Staten Island, New York 10301

/s/ ALAN ROTHSTEIN
ALAN ROTHSTEIN
Amicus Curiae Citizens Union*
198 Broadway
New York, New York 10038

SO ORDERED
/s/ EDWARD R. NEAHER,
U.S.D.J.

Dated: Brooklyn, New York
February 13, 1985

* Amicus Curiae Citizens Union will submit papers in accordance with the schedule assigned to plaintiffs.

Affidavit of Robert A. Straniere, Submitted in Accordance With the Joint Stipulation Entered into by All Parties, dated March 15, 1985

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81 Civ. 3920 (ERN)

BEVERLY MORRIS; JOY CLARKE HOLMES; JOANNE OPLUSTIL,

Plaintiffs,

—against—

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of New York, CAROL BELLAMY, as City Council President, HARRISON J. GOLDIN, individually and as Comptroller for the City of New York, HOWARD GOLDEN, ANDREW STEIN, STANLEY SIMON, DONALD MANES, RALPH LAMBERTI, each individually and as Borough Presidents of the boroughs of the City of New York,

Defendants,

—and—

FRANK V. PONTERIO,

Intervenor-Defendant,

ROBERT A. STRANIERE, individually and as a member of the New York State Assembly,

Intervenor-Defendant.

Affidavit of Robert A. Straniere

STATE OF NEW YORK,
COUNTY OF RICHMOND, SS.:

ROBERT A. STRANIERE, a member of the New York State Assembly and an attorney duly licensed to practice law in the State of New York, being first duly sworn, deposes and says:

1. This affidavit is submited in accordance with a joint stipulation entered into by all parties in this action, dated the 13th day of February, 1985, in which it was agreed and ordered by this Court that, in lieu of a hearing calling for the presentation of oral testimony, the parties shall be permitted to submit further papers • on those policies and interests which the Supreme Court has held may justify the 132.9% maximum deviation from population equality found by this Court to exist on the Board of Estimate of the City of New York.

2. I am presently serving my third term in office as a New York State Assemblyman, representing the 60th

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• Given the immediate procedural context of this action, rather than an actual brief, the following "memorandum-styled" affidavit seems to be the more appropriate format for furnishing written testimony (which would have been presented orally had your deponent been called as a witness during a hearing), particularly since the more technical legal arguments on the issue of policy justifications have already been addressed in formal briefs by the various parties, submitted to this Court in October and December of 1983.

While this format is somewhat unconventional, it would appear consistent with the character and nature of these proceedings. As this Court indicated during a "status conference" held on July 1, 1983, the present "one person one vote" challenge to the Board of Estimate should not be treated merely as standard litigation, but more as a "generation of ideas to find a solution to the problem the Second Circuit has presented." (Neaher, D.J., E.D.N.Y.)

Assembly District within the County of Richmond. From 1966 through 1968 I served as Assistant Corporation Counsel of the City of New York, and from 1968 to 1969, I served as Assistant Legislative Representative of the City of New York, representing the Office of the Mayor and the City on legislative matters in the State Legislature in Albany. In 1972, I served as Counsel to the New York State Senate Committee in New York City which acted on all state legislation affecting the City of New York. Finally, from 1965 through 1980, I served as Counsel to State Senator John J. Marchi, the present Chairman of the prestigious Senate Finance Committee.

3. Throughout my twenty-one years of State legislative experience, I have become quite familiar with the operation, structure and increasing role of the Board of Estimate and its effect upon New York City government.

4. Following the May 16, 1983 decision of the U.S. Court of Appeals remanding the present case to this Court for findings concerning the level of malapportionment on the Board and the weight of *state interests* that could justify that level, *Morris* v. *Board of Estimate*, 707 F.2d 686 (2d Cir. 1983), this Court granted my request to intervene so that my interest, as a Staten Island legislator, and the interest of the State Legislature in preserving the Board's present governing structure could be adequately represented in this action.

5. This affidavit seeks to more fully establish this State's policies and interests which clearly justify the level of deviation found to exist on the Board, and the lack of effective alternatives to the Board's present membership

and voting structure if the one person, one vote principle is to be strictly applied.

I. The Policies and Interests of the State

A. *The Creation and Organization of Local Governments*

6. Just as the United States Supreme Court, in *Brown* v. *Thomson*, — U.S. —, 103 S. Ct. 2690 (1983), looked first to Wyoming's Constitution to determine whether that state's legislative apportionment statute could reasonably be said to advance a rational state policy, so do I begin with reference to the constitution of this State. Under Article 3, § 1 of New York's Constitution, the legislative power of this State is vested in the Senate and Assembly, and our State Legislature is given "full power, except as restricted by the constitution, to control by direct legislation the local affairs of a public nature of any of the civil divisions of the state." *People* v. *Tweed*, 63 N.Y. 202 (1875).

7. In addition, while not specifically addressing New York City's Board of Estimate, Article 9, § 2 declares that "the Legislature shall provide for the creation and organization of local governments," and it is for the Legislature to distribute the powers of local government, as between city and county governments, as it may deem best. *People* v. *Dunlap*, 66 N.Y. 162 (1876); *see also Kramarsky*, "The Structure, Powers and Functions of New York City's Board of Estimate," Report to the New York State Charter Revision Commission, (hereinafter cited as *The Kramarsky Study*) at 1, (1973) ("For New York City, the

ultimate seat of governmental authority has always resided in the State Legislature in Albany.").

8. Accordingly, in 1896, a bill was passed by the New York State Legislature and signed into law (Chapter 488, *1896 Laws of New York*) which provided for the expansion of New York City beyond its existing boundaries of the Island of Manhattan through the consolidation of its surrounding areas. The consolidation became effective of January 1, 1898 (Chapter 378, *1897 Laws of New York*), at which time the five counties that now make up the City of New York were to become known as the boroughs of Manhattan, Brooklyn, Queens, Bronx and Richmond (Staten Island).

B. *The Preservation of Counties as Governmental Subdivision of the State*

9. While the Legislature could have abolished the county form of government in Richmond, Queens, New York (Manhattan) and Kings (Brooklyn) counties * and created instead, one county coterminous with the City's enlarged boundaries, the State chose to preserve the existing counties as governmental entities. *See Report of the Charter Revision Commission,* New York State Assembly Documents, Vol. 12, No. 40, xix (1901) ("It is clear that the vast territory comprised within the present City of New York, embracing as it does, districts *so essentially different* as the crowded east side of Manhattan and the rural districts of Queens and Richmond, *demands some subdivision and some degree of local autonomy.*") (emphasis added)

* The Bronx did not become a formal county until 1914 (Chapter 548, *1912 Laws of New York*).

10. Thus, in the eyes of the State, the five component parts of the newly created City of New York would *still* be recognized and considered as five separate and distinct counties within New York State. Indeed today, one need only look through the "New York County Law" (McKinney 1972) (specifically, Article 24, entitled "Provisions Applicable to New York City") to see that over the years, the Legislature has specifically intended to preserve certain "county" features * with respect to each of the five boroughs as separate counties, even though they are wholly within a consolidated New York City.

11. Moreover, throughout the City's eighty-seven year history, despite numerous charter revision commissions that have considered changes in the City's governmental structure, upon information and belief there has never been a suggestion by the Legislature or its charter commissions to abolish the counties as separate entities within the City.

C. *The Presentation of Counties*** *(Boroughs) as Representational Entities*

12. In light of the foregoing discussion, if one happened to be living on Staten Island (Richmond County) at the turn of the century, he or she would have been in the

* The fact that we continue to elect district attorneys from "each of the *counties* of New York, Kings, Bronx, Queens and Richmond" (N.Y. County Law § 926) (emphasis added) and the fact that the office of the county clerk can still be found in each of the "*counties* comprising the city of New York" (N.Y. County Law § 908) (emphasis added) are two illustrations of "county" features intended to be preserved by the State Legislature.

** Throughout the remainder of this affidavit, the term "county" will often be used in place of "borough" to designate any of the five subdivisions of the City.

unique position (vis-à-vis State residents living outside New York City) of residing in a county that was not only a subdivision of the State (as were all counties), but was also a subdivision of the State's largest City. As a resident of a county within the State, the Staten Islander's interests with respect to statewide legislative matters would clearly have been represented in Albany by his or her duly elected State Assemblyman and Senator. However, as a resident of a county within the City of New York, the State was also concerned that the Islander's local interests were adequately represented in City government, particularly since there would be no county legislature or other local governing forum other than that of the City. This became the subject of serious consideration by a governor-appointed charter revision commission which, in 1901, made recommendations for the restructuring of the City's policy-making body, known then as the Board of Estimate and Apportionment.

13. The *1901* Charter gave the Board broad powers that would have a direct and significant impact upon each of the five diverse counties of New York City. Consequently, the aforesaid charter revision commission sought to insure that the varying needs and interests of each county would be adequately addressed by the Board through direct county (borough) representation:

> [T]he facts that the Board of Estimate and Apportionment was given the power to disapprove the decisions of Local Improvement Boards, and to determine the amount of money to be expended out of the treasury of the city in public work in each borough make it proper that the boroughs should have a direct representation on the Board.

Report of the Charter Revision Commission, New York Assembly Documents, Vol. 12, No. 40, at xxv (1901).

14. The State Legislature, reflecting the views of the entire State, adopted the above recommendations and direct county representation through each borough president's vote on the Board has been embodied in New York City's Charter for over eighty-four years. To be sure, this longstanding state policy was not completely free from attack. The role of the borough presidents as county advocates withstood several unsuccessful challenges by various charter commissions between 1907 and 1934. However, the rationale underlying the presence of the borough presidents on the Board was reaffirmed in the recommendations of a 1935 charter revision commission (the Thacher Commission) appointed by Mayor Fiorella La Guardia:

> The Commission is satisfied that there exists in a large part of the city an overwhelming sentiment not only for borough representation on the Board of Estimate but that strictly local improvements, paid for by assessments on the homes of the people in the respective neighborhoods, be entrusted to local officers *readily accessible and responsive to the people affected.* The Commission believes that this desire for local self-government should be recognized where it is possible to do so without sacrifice of efficiency and economy.

Proposed Charter for the City of New York, August 17, 1936 and *Report of New York City Charter Revision Commission,* 1936, pp. 8 and 9. (*See* Appendix to Plaintiffs' Memorandum in Support of Their Motion for Summary Judgment)

D. *Summary: The Unique Relationship Between the City and State of New York*

15. Historically, there has and continues to be a special and unique relationship between the City and State of New York. New York City is the only city of its class in the State, having a "population of one million or more" (a phrase used throughout our statutes to distinguish New York City from all other cities in the State). The City of New York is the only city in the State comprised of two or more counties wholly within its boundaries. Far from an arbitrary system, New York City's governmental structure has received unparalleled scrutiny, recommendations and subsequent revisions as evidenced by the history of its consolidation and the series of State appointed, authorized and approved charter revision commissions which date as far back as 1868, and continue up to the 1973 Goodman Commission, whose recommendations were presented to the voters eight years ago. Indeed, even the City's Administrative Code and continuously amended by formal acts of the State Legislature.

16. The unique relationship described above has also been recognized in other areas including the State's real property tax law. After the 1975 N.Y. Court of Appeals (*Hellerstein*) ruling requiring that all real property in the State be assessed at full value, the State's Division of Equalization and Assessment made the following observations in a February, 1980 "Report on Proposed Reforms in Real Property Tax Administration," at pp. 11-12:

> Currently, the property tax system in New York City is considerably different than in the rest of the State. Over the years, many exemptions and special

> provisions have been enacted with applicability only in New York City. These measures *recognized the uniqueness* of the City. It may now be necessary to more formally recognize the distinction between property taxation within the City and in the rest of the State. The City's Real Property Tax Department recognizes that its assessment rolls are presently in such need of repair that estimates of inter-class shift based on equalization surveys are hazardous at best. . . . The State stands ready to assist the City in exploring the alternatives and developing the most viable solution."

17. In December of 1980, I followed up on the State's offer and pre-filed my first bill as a member of the Assembly, co-sponsored by Senator John Marchi, which sought to establish an assessment system for New York City which maintained the existing relative tax burden of each type of real property within each of the five counties. (Assembly Bill No. A-304, Introduced in the 1981-1982 Regular Session of the Legislature)

18. The point of these illustrations is to once again emphasize the fact that the State has a strong vested interest in the five component parts of a *unique* New York City, not simply as boroughs, but as separate and distinct counties within the State. That interest demands the special treatment that has been consistently extended to these five counties in the laws of this State.

19. In upholding Wyoming's legislative apportionment statute providing at least one representative from each county, the U.S. Supreme Court, in *Brown,* emphasized that Wyoming's policy of preserving county boundaries

was based on the state Constitution, had been followed for decades, and had been applied consistently throughout the State. Moreover, the Court pointed out that this policy had "particular force given the *peculiar size and population of the State and the nature of its governmental structure.*" *Brown* v. *Thomson,* 103 S. Ct. at 2696 (emphasis added).

20. While the *Brown* case might be easily distinguished since the State's entire apportionment plan was not put in issue (although the same could be said about this case since the equal voting power of the borough presidents and not the entire Board is the real issue here), the underlying rationale and the State's policies and interests that were held to justify the level of malapportionment caused by Wyoming's statute are strikingly similar to those advanced by the present voting structure and membership of the Board of Estimate. But this should not come as a surprise to the plaintiffs herein. They have, in fact, agreed (although not unconditionally) that the Board's present makeup advances not less than five policies and interests of this State (the first two of which have already been adressed in the foregoing paragraphs:

1. Preservation of the boroughs as representational entities in local government;
2. Use of natural and historical borough boundaries to define representational entities in local government;
3. Ability to balance differing interests and needs, and to accommodate development and long-term planning requirements of both the boroughs and the City as a whole;

4. Correlation between the functions of the Board and the impact of those functions upon the boroughs, particularly in regard to the formulation of the capital budget, in order to assure that different parts of the City get their fair share of service contracts and capital budget allocation which might otherwise go to those portions of the City contributing the most tax dollars;
5. Ability of the Board as presently constituted to eliminate undue concentration of executive power and to supplement the City Council, which retains the general legislative power of the City.

See "Joint Stipulation of Policies and Interests Served by the Board of Estimate," October 18, 1984. Having already considered "1" and "2", I now turn to the third, fourth and fifth policies analyzed respectively in Parts II, III and IV of this affidavit.

II. The Effectiveness of the Board

21. In its "Memorandum and Order" issued August 21, 1984, this Court directed that the parties, in addition to identifying those policies and interests presently served by the Board, were to specifically examine two particular concerns, one being "the Board's conceded effectiveness" as presently structured. *See* "Memorandum and Order" of District Judge Edward R. Neaher, at 34. (The second particular concern will be explored in Part III of this affidavit.)

22. The Board's "effectiveness" will be analyzed in terms of its ability to achieve "fair and effective represen-

tation for all citizens" of New York City since, according to the Supreme Court in *Reynolds* v. *Sims,* 377 U.S. 533 (1964), this is the basic aim of all legislative apportionment.

A. *The Ability to Balance Differing Interests and Needs of Both the Counties of the City and the City as a Whole*

23. Census figures, demographics and individualized borough planning and zoning resolutions point to at least one clear conclusion: no two counties of the City are alike. Each of the five counties have separate and unique characteristics, including their own history and their own future. But together, they make up an equally distinct municipality governed as one city. And logically, given the sole fact that New York City is a combination of five separate counties, it is only natural that tensions will arise over what is best for the individual county as compared to what is best for the City as a whole.

24. The issue of how best to govern this inherently tension-producing, consolidated City was considered by Walter Lippmann in Werner Kramarsky's report to the State Charter Revision Commission in 1973:

> The city is much too big to be governed as a single centralized unit. It is also too varied in its population and its occupations. It is also too old in the traditions of local independence. On the other hand, of course, the interests of the people in all the boroughs are much too closely related not to be dealt with under city-wide and co-ordinated policies.

The Kramarsky Study, supra, at 15.

25. In 1900, an effective solution was reached when a governor-appointed charter revision commission, responsible for drafting the 1901 Greater New York Charter, gave the City's Board of Estimate its present composition of three city-wide elected officials, and five duly-elected representatives of each of the City's five counties. The importance of direct county representation was also discussed in the *The Kramarsky Study,* at 115:

> The ability of the community leaders to bring their problems directly to the Borough Presidents *contributes to citizen participation in government.* It is unique to the office that a Borough President, as a member of the Board of Estimate, is able to approach the solution of local conflicts with an intimate knowledge of city-wide problems, policies and programs. Bringing the attributes of chief executive of his borough to the deliberations of the Board is a *vital balancing force.* (emphasis added)

26. Even the plaintiffs agree that the presence of the borough presidents and city-wide officials enables the Board to "balance differing interests and needs, and to accommodate development and long-term planning requirements" of both the counties and the City as a whole. See "Joint Stipulation of Policies and Interests" at 7.

B. *Fair and Effective Representation For All Citizens*

27. Without yet considering the size of their vote, the presence of one county representative from each county seems fair on its face, giving each and every county an equal voice in City affairs. Since, by definition, all citizens of the City must reside in one of its five counties, no one

citizen or group of citizens is denied representation on the Board.

28. Effective representation, in light of *Reynolds,* amounts to the ability of a representative to advance the interests of his or her constituency on a substantially equal basis with the other representatives elected to a legislative body that makes governmental decisions affecting their respective constituencies. Given the relatively small size of the eight-member Board, the ability of each county representative to put forth the interests of his or her county is enhanced, as it is much easier to bring to the Board's attention the unique concerns and potential consequences of the county he or she represents before an actual decision is reached on any particular matter. The Board is a collegial body, not some enormous, multi-member legislature where it is often difficult to get in a word during deliberations.

29. Obviously, every interest within a particular county can not always be advanced on every matter acted upon by the Board. However, as long as the county representative continues to be elected by only the respective county's residents, he or she remains directly accountable to the majority views and interests of that county, which are constantly re-aligned with each new issue that is brought before the Board for resolution. As stated above, the presence of the borough presidents contributes to citizen participation in government and the fact that there might be a strong borough-wide consensus on one issue, and a greater level of disagreement on another is simply a fact of political life that each borough president, as a county representative, is faced with.

C. *Summary: The Ordering of Governmental Priorities*

30. Throughout the history of New York City, the Board of Estimate has been the principal body where the difficult task of ordering governmental priorities between competing claims of the component county and city-wide interests "has been deliberately institutionalized." *The Kramarsky Study,* at 15. This rational policy of balancing competing interests has been advanced by the Board's membership and voting structure and has resulted in fair and effective representation for all residents of the City.

31. In my twenty-one years of State legislative experience, I do not recall any measure that came before either house of the Legislature which provided for a change in the Board's present makeup. The State Legislature, in its wisdom, has recognized that the balancing function of the Board contributes substantially to its ability to effectively govern the City and the Legislature has deliberately chosen not to disturb its structure.

32. Finally, even the plaintiffs have admitted that the Board, as presently structured, was designed "to effect compromise between local and citywide interests by seating together borough and citywide officials." *Plaintiffs' Memorandum in Support of Their Motion for Summary Judgment,* December 16, 1983, at 4. In addition they concede that the Board presently works "very well and may be very efficient." *See* June 6, 1982, Hearing Transcript at 53.

III. The Meaningful Participation by the Lesser Populated Counties in Board Affairs

33. The second particular concern which this Court has directed the parties to consider is the "meaningful participation" by the lesser populated counties in Board affairs under the Board's present structure. *See* Memorandum and Order of Judge Neaher at 34. As with the Board's "effectiveness" considered above, "meaningful participation" will be analyzed in the context of "fair and effective representation for all citizens" of New York City, the basic aim of all legislative apportionment under *Reynolds*.

A. *An Equal Voice for Each County*

34. In 1958, as a result of population shifts among the City's five counties, the voting strength on the Board of Estimate was realigned by the State Legislature, giving all the borough presidents equal voting power. *See* Chapter 719, *1958 Laws of New York*. The Legislature recognized then that each of the counties is separate and unique and that in order to effectuate appropriate City-wide policy, *all* of the counties, including the lesser populated Bronx and Richmond counties that were now growing in population, deserved to be treated on equal footing during the Board's decision-making process.

35. As all parties have agreed, the allocation of an equal voice to each of the five county representatives advances the policy of insuring that "different parts of the City get their fair share of service contracts and capital budget allocations." *See* "Joint Stipulation of Policies and Interests" at 8.

B. *Fair and Effective Representation: A Hypothetical City*

36. Consider the following hypothetical city:

> The City of Grymes is composed of five districts of equal geographic area. While the total population of Grymes is 100,000, only 5,000 persons live in the one of the five districts. However, the smallest district is growing at an enormous rate, outpacing all the other districts, and the smallest district has the greatest proportion of undeveloped land within its boundaries. Finally, assume that the two most important governmental functions carried out by the City of Grymes, through its legislative body, are the delivery of municipal services and determining land use citywide.

37. If a strict one person, one vote formula were to apply to the above city's general legislative body, clearly the four largest districts would be able to dictate not only what services the smallest district would receive, but more importantly, would decide how best to utilize that district's greatest proportion of undeveloped land. Future planning would rest almost entirely in the hands of those representing the largest districts. Ironically, decisions could be made by those least familiar with the needs and interests of the smallest district (that has only 1/20th of all votes).

38. This exaggerated and oversimplified hypothetical serves to illustrate one very important consideration in applying a strict one person, one vote formula to local governments: decisions over matters affecting citizens *closest to home*, i.e. land use and the delivery of municipal

services, could be made by the proper legislative body without carefully addressing the specific interests of those who stand to gain or lose the most as a result of those decisions. The New York State Legislature, in structuring the Board so as to provide *equal* county representation on the Board, sought to avoid this possible harsh result.

39. Staten Island (Richmond County) continues to grow at an enormous rate and holds the largest proportion of undeveloped City-owned property among the five counties. Since careful planning is certainly incident to rapid growth, the mapping and zoning functions of the Board of Estimate will, quite naturally, continue to have the single greatest impact upon this, the least populated county within the City. Given the fact that these land use and development decisions made by the Board are often viewed as "purely local" in effect, it is essential that the State continue to provide the residents of Staten Island an equal contributing voice in the making of these important county-wide decisions.

40. As all the parties herein have agreed, there exists a "correlation between the functions of the Board and the impact of those functions upon the boroughs." *See* "Joint Stipulation of Policies and Interests" at 8. The policy of assuring that the different parts of the City receive fair treatment is presently advanced by the Board's current voting structure. Given the impact the Board will continue to have in Richmond County, that voting structure must be preserved to insure Staten Islanders fair and effective representation on the Board.

C. *Preventing a "Tyranny of Pure Numbers"*

41. The exaggerated hypothetical above illustrates the possibility of a "tyranny of pure numbers" since, strictly applying the one person, one vote mandate, the smallest district would always have only 1/20th a share of the voting power although it contains one fifth of the total geographic area of the City of Grymes. Serving with the State Legislature under both the Republican-controlled Senate and the Democratic-controlled Assembly, I have seen first hand the effects of this "tyranny of pure numbers." I have experienced both the benefits of working within the majority party as well as the frustrations of being in the minority. The mere fact that one political party possesses the greater number of votes within a legislative body allows it the privileges of setting agendas, controlling deliberations (who can speak first) and preserving their majority of votes on all committees. When in the minority, it is difficult just to get legislation passed. And in my twenty-one legislative sessions, I do not recall a single instance where a member of the minority party in either house was able to have an amendment prevail when offered directly from the house floor during debate.

42. While a majority and minority of votes on the Board can not be waived as aligning along political party lines, the dynamics of pure voting numbers could manifest along geographic lines among the county representatives on the Board. If one person, one vote principle were to be strictly applied to the Board, the county representatives from Brooklyn and Queens would, in effect, become the majority party on the Board simply because they would control the greatest number of votes among the borough presidents. The process of ordering government priorities

between city-wide and local interests would be controlled entirely by the interests of Brooklyn and Queens, interestingly the only two counties that are connected other than by the City's bridges and tunnels (there is no clear geographic dividing line between the counties).

43. By affording each county representative on the Board an equal voice, the Legislature has provided a "check and balance" against a "tyranny of pure numbers" among local interests. Without it, the status of Staten Island's Borough President would be translated to that of a "mere observer" over the Board's deliberations. The State has recognized that the interests of each county, including Staten Island, must be adequately considered. In order to accommodate these diverse interests, New York City has been afforded a greater degree of flexibility in its governmental structure. No other subdivision of this this State is faced with such diversity in so limited an area.

44. The United States Supreme Court has also recognized the possibility of a "tyranny of pure numbers" among local governments (the entities which have the most direct affect upon the citizens of the states). While state legislative reapportionment plans are held to a lower standard than congressional redistricting plans (permitting greater deviations from the ideal of absolute numerical equality and recognizing more justifications for such deviations), local governments are given even greater latitude:

> . . . Indeed, the Supreme Court has noted that the constitutional principles that govern the apportionment of state legislatures are not necessarily applicable to the organization of local legislative bodies.

> "Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation."

Greenwald v. *Board of Sup'rs of County of Sullivan,* 567 F. Supp. 200, 203 (1983) (quoting *Sailors* v. *Board of Education,* 387 U.S. 105, 110-111 (1967)).

IV. The Board Decentralizes Executive Power and Supplements Legislative Power

45. The last underlying policy, which the parties agree is served by the Board as presently constituted, is the ability of the Board to eliminate undue concentration of executive power and to supplement City Council's legislative power. By allowing county representatives to vote on matters of city-wide concern, the Board clearly reflects the desire to decentralize the power of the Mayor among the subdivisions of the City.

46. The Second Circuit has already ruled that the Board performs "general governmental functions," *Morris* v. *Board of Estimate,* 707 F.2d 686 (2d Cir. 1983), some of which could be considered as supplementing City Council's legislative role, i.e. budget review and land use (zoning) decisions.

47. Finally, the fact that the Board of Estimate coexists with the City Council was considered in *Andrews* v. *Koch,* 528 F. Supp. 246 (1981). There, the allocation of two at-large seats in the City Council for each of the

City's five counties was held to have violated the one person, one vote mandate. In dismissing the defendants' claim that the population deviations were justified because of the need to recognize the local concerns of each borough, this very Court relied, in part, on the fact that "additional channels of communication exist between the boroughs and City Hall through the Borough Presidents, who sit on the Board of Estimate." 528 F. Supp. at 251. This Court also had noted that "while it may be true that more power resides in City Hall, judicial notice may be taken that each Borough President still has a vote on the Board of Estimate." *Id.* at 249.

48. This Court's opinion in *Andrews* correctly implies that the Board not only supplements the legislative power of City Council, but also advances a rational policy of balancing local and city-wide interests as a result of the borough presidents' voice on the Board.

V. No Clear Alternatives

49. While not directed to do so, a few words concerning the possible alternatives to the Board are in order here. Basically, a strict application of one person, one vote formula to the Board of Estimate could lead to one of two possible alternatives. Both involve increasing the larger boroughs' voting power, the first by way of a weighted voting system, and the second by way of increasing the membership of the Board.

50. Obviously, if the State Legislature were to adopt a weighted voting system for the Board, allocating a greater number of votes to the borough presidents of the

larger counties, the interests of Brooklyn and Queens would clearly dominate. As an effective majority among the borough presidents, the representatives of Brooklyn and Queens could control the deliberations with city-wide officials, and could set agendas and priorities with the same degree of influence that is found in the majority parties in each house of the Legislature. Furthermore, the plaintiffs themselves have advanced the argument that the borough presidents of the larger counties can not truly represent their local constituencies because their borough neighborhoods are too diverse. Is it, therefore, rational to give these same officials greater voting power at the expense of the lesser populated counties, particularly Staten Island, where plaintiffs argue is the only place in which a borough president can truly represent local interests? Assuming, of course, that the borough presidents can not split up their greater portion of votes to reflect the differing neighborhood views, this first alternative makes absolutely no sense and would destroy a delicate balance among county representatives on the Board that has been preserved for over eighty years.

51. The second alternative, increasing the membership of the Board is equally without merit. This would entail redrawing neighborhood districts within the larger counties, giving each district a population size roughly equivalent to that of Staten Island. However, the balkanization of the City in such a manner would be destructive not only to the City as a whole because of the greater difficulty with a larger Board of developing a unified citywide policy, but would be destructive to the individual planning schemes and zoning resolutions in each of the five distinct counties. New York City is not a homogenous tract of

farmland that can be easily sliced up into portions that bear no relationship with each other (except possibly for the fact that each has roughly the same population). This second alternative is just as unworkable as the first and contradicts the underlying policies that have preserved the Board as an efficient and effective governing body for this extremely diverse City.

52. Finally, the plaintiffs have suggested that under a scheme of neighborhood districts under the second alternative, representatives of neighborhoods demographically similar to the characteristics of Staten Island would vote together on measures before the Board because of similar economic interests. This suggestion, however, ignores the fact that a great majority of the decisions made by the Board are geographically oriented, affecting only certain parts of the City with each new measure acted upon. While a white, middle-class, college-educated resident of Staten Island might have overall economic interests similar to that of a resident of Bay Ridge, Brooklyn, with similar demographic characteristics, that will not keep a Staten Island representative from supporting, and a Bay Ridge representative opposing a plan to build a resource recovery plant in Brooklyn, as opposed to on Staten Island. As long as the Board of Estimate continues to decide issues affecting the use of land, the delivery of municipal services and capital projects, and development planning throughout the City, the interests of City residents will continue to align along geographic (i.e. county) rather than demographic boundaries.

CONCLUSION

For all the foregoing reasons, your deponent submits that the present voting structure and allocation of seats on the Board of Estimate, as provided by sections 61 and 62 of the New York City Charter, should be upheld as not violative of the Fourteenth Amendment to the United States Constitution.

Dated: Staten Island, New York
March 15, 1985

/s/ Robert A. Straniere
Robert A. Straniere
Intervenor-Defendant
182 Rose Avenue
Staten Island, N.Y. 10306
(718) 667-0314

/s/ Albert P. De Lillo
Notary Public

Sworn to before me this 15th day of March, 1985

Affidavit of John J. Marchi, Read in Support of the Continuation of the Present Voting Structure of the Board of Estimate, dated March 15, 1985

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81 Civ. 3920 (ERN)

BEVERLY MORRIS; JOY CLARKE HOLMES; JOANNE OPLUSTIL,

Plaintiffs,

—against—

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of New York, CAROL BELLAMY, as City Council President, HARRISON J. GOLDIN, individually and as Comptroller for the City of New York, HOWARD GOLDEN, ANDREW STEIN, STANLEY SIMON, DONALD MANES, RALPH LAMBERTI, each individually and as Borough Presidents of the boroughs of the City of New York,

Defendants,

—and—

FRANK V. PONTERIO,

Intervenor-Defendant,

ROBERT A. STRANIERE, individually and as a member of the New York State Assembly,

Intervenor-Defendant.

Affidavit of John J. Marchi

STATE OF NEW YORK,
COUNTY OF RICHMOND, SS.:

JOHN J. MARCHI, being duly sworn deposes and states:

1. I reside in Richmond County, Staten Island, New York, having lived on Staten Island my entire life, except for periods of military service.

2. I represent the 24th Senatorial District in the New York State Senate, which encompasses all but a small portion of Staten Island. I was first elected to the Senate by my Staten Island constituents in 1956, having gained re-election in each subsequent election. Until the reapportionment following the 1980 census, I was the only Senator from Staten Island, with the enormous population growth entitling my county to one full and a portion of another Senatorial District. (The other Senatorial District, the 25th is composed primarily of lower New York County, with a small portion of Richmond County.)

3. Since 1973, I have served as Chairman of the New York State Senate Finance Committee. Since my election to the Senate, I have been intimately involved with legislation concerning the City of New York, having served as Chairman of the New York State Senate Standing Committee on the Affairs of New York City from 1963 to 1973 (except in 1965). I have for several years been the lead sponsor on several, if not most, of the bills in the New York City legislative program. My interest in and concern for the City of New York sparked by two ill-fated runs for New York City Mayor in 1969 and 1973.

4. After this case was remanded from the Second Circuit Court of Appeals (707 F2nd 690) to the Eastern Dis-

trict, I moved to intervene as an *Amicus Curiae* and filed a brief in that regard.

5. Since the degree of malapportionment present has already been decided in this Court's memorandum and order dated August 21, 1984, this Affidavit is directed to the remaining portion of the Second Circuit's remand which directed a determination of the *"weight of state interests alleged to justify whatever level of deviation exists* or whether the combination of at-large and local seats, in the context of the voting procedures of the Board, creates a system of representation that satisfies constitutional standards for instruments of local governments" and "rule on the policies and interests which the Supreme Court has held *may justify deviations* from the literal one person one vote formula" in conjunction with the Court in footnote 3 noting "the fact that three members of the Board are elected at large from the entire city raises *novel issues* as to how an individual voter's opportunity to elect these members should be assessed in conjunction with his opportunity to elect his borough representative." (*emphasis added*) Also submitted and attached as exhibits hereto, are various other affidavits all directed to this question of the policies and interests which justify the retention of the present composition and voting structure of the Board of Estimate. (Exhibit A, Affidavit of Loring McMillen (hereinafter referred to as the McMillen Affidavit); Exhibit B, Affidavit of Albert V. Maniscalco (hereinafter referred to as the Maniscalco Affidavit); Exhibit C, Affidavit of James F. Regan (hereinafter referred to as the Regan Affidavit); Exhibit D, Affidavit of Les Trautmann (hereinafter referred to as the Trautmann Affidavit); Exhibit E, Affidavit of David Jaffe (hereinafter referred to as the Jaffe Affidavit). All references I make to these affidavits are based upon information and belief.

6. To understand the rational state policies which underlies and justifies the composition of the Board of Estimate, it is important to note some very basic, yet salient facts: New York City, composed of five boroughs which are also five individual counties of the State, is a municipal corporation, created by the Legislature as "an agency of the State for conducting the affairs of government and as such it is subject to the control of the Legislature." (*Matter of LaGuardia* v. *Smith,* 285 N.Y. 1 at 7 (1942).

7. As is detailed in the McMillen Affidavit (¶¶ 9-10) drawn by an expert on Staten Island history, prior to consolidation Staten Island as the County of Richmond was governed under a system of county government with each of its five townships electing a member of its Board of Supervisors. The people elected numerous county officials, including surrogate and county judges, district attorney, sheriff, county clerk and treasurers. Each town also elected four justices of the peace, a board of assessors, four constables, town clerk, three excise commissioners and a highway commissioner. Additionally, there were four incorporated villages with each having its own local government and electing a board of trustees, health officer, clerk, treasurer and engineer. Obviously, the people of the County of Richmond prior to consolidation were directly responsible for electing those officials who governed their county.

8. After the 1894 referendum in which Staten Islanders overwhelmingly voted for consolidation, there were numer-

ous hearings concerning the subject of the consolidation of Richmond County and other areas surrounding Manhattan into Greater New York. There was extensive debate on the subject, with numerous arguments being advanced on both sides of the issue. According to the McMillen Affidavit, there was never raised the question of adequate representation of Staten Island in the City's governing bodies, with the Staten Island voters and leaders "obviously . . . satisfied that the Island, small in population as compared to the rest of the proposed boroughs would be adequately represented." (McMillen Affidavit ¶ 10)

9. It is also very interesting to note that during the period in the mid 1890's when Richmond County was considering this consolidation issue, it was actively pursuing another option—incorporating as a city of the second class, an independent municipality within New York State. (McMillen Affidavit ¶¶ 13-15) The Richmond County Board of Supervisors had established a Committee on City Charter to examine the possibility of Richmond County becoming an independent city. The Committee researched all the statutes relating to Richmond County governance as well as the Constitutional and Statutory provisions relating to establishing Richmond County as an independent city. In 1896, the Committee concluded that such action could be accomplished, but recommended that since the movement for consolidation, which had been approved by the Staten Island voters, appeared to be close to reality, any action on a separate city should be postponed. (McMillen Affidavit ¶ 15) Such action on a separate city was never taken, since consolidation became a reality on January 1, 1898.

10. In the expert opinion of Borough Historian Loring McMillen:

> *"The citizens and officials of Richmond County of late 1890s would never have chosen to give up their own county form of government or their plans to pursue an independent city form of government if they knew, or even suspected, that they or their successors would not have had a meaningful voice in the major decisions affecting their county." (emphasis added)* (McMillen Affidavit ¶ 19)

11. With the consolidation, the "outer boroughs" (all but Manhattan) gave up their own forms of government in return for becoming part of the municipal government of New York City. An implied condition of this "contract" of consolidation was, as can be seen from the expert opinion of Borough Historian Loring McMillen, quoted in paragraph 10 above, that Richmond County would have a meaningful voice in the major decisions affecting their county. If the plaintiffs' position prevails this implied condition will have been breached, with Richmond County stripped of any role in the determinations made by the Board of Estimate, determinations that can and do impact so greatly on this county and its future.

12. The State statute that consolidated New York City also enacted the First Greater New York Charter (Chap. 378, *Laws of 1897*). With the consolidation, New York City was composed of five boroughs, four of which were already counties in New York State. (Richmond, Queens, New York and Kings were four of the original twelve New York Counties: the fifth borough, the Bronx, did not become a county until 1914).

Affidavit of John J. Marchi

13. In the 1901 Charter (drafted by a New York State Charter Revision Commission created by Chapter 465, Laws of 1900), the Board of Estimate (then called the Board of Estimate and Apportionment) was given its present composition of the city-wide officials and the borough presidents. The State Charter Revision Commission specifically noted that it was *"proper that the Boroughs should have a direct representation on the Board"* [*New York State Charter Revision Commission at XXIV, XXV (1900)*]. In the years which have followed, the State has played the lead role in determining the governance of the City, and has purposely maintained the meaningful borough presence not only on the Board of Estimate but in other governmental entities within the City of New York.

14. The extent of the State's role in the governmental structure of the City is evidenced by the sheer number of times an act of the Legislature has amended either the New York City Charter or the New York City Administrative Code. A staff review of the Legislative Indexes reveals that since 1907 (the pre-1907 indexes group all Session Laws affecting New York City together, without any separate category for the Administrative Code or Charter), there have been 1,064 Session Laws specifically amending the New York City Administrative Code, and 594 Session Laws amending the New York City Charter. If one adds to these amendments the number of major charter changes that have been effectuated by New York State Charter Revision's Commissions (detailed in the *Amicus* brief I previously submitted to this Court), the enormous involvement of the State in the governmental structure of the City is evident.

Affidavit of John J. Marchi

15. Despite the fact that the Charter has been revised hundreds of times since the 1901 Charter, there has never been a change in the composition of the Board of Estimate and there have been only two changes (both by state statute) in the voting structure.

16. The next major charter revision after 1901, took effect in 1938 as the result of the 1936 New York City Charter Revision Commission and in it the Board of Estimate specifically maintained the meaningful presence of each borough president. Even though this Commission made some major changes in the powers of the Board of Estimate, it left the Board's composition and voting structure intact, stating that Board "must be representative, and some of its members must be intimately familiar with the conditions and needs of the boroughs" with each borough having the "right" to "separate and direct representation in the administration of the city's government," and, with such representation being "not only important in the interest of the boroughs but in the interest of the city as a whole" [*City Charter Revision Commission* at 15, 19 (1936)]. Neither the 1960 New York State Charter Commission which drafted the 1963 Charter, nor the 1975 New York State Charter Revision Commission changed the composition of the Board, with the 1975 Commission specifically noting that the Board's "mixture of City wide and borough officials provides a balanced perspective," with the Board "forged from singular historical development and attributes of New York City and its distinct geographic parts" [*Recommendations of the New York State Charter Revision Commission for New York City* at 1-2 (1975)].

17. The only changes in the voting structure of the Board came by State legislative action in 1958 and 1978. Through Chapter 719, *Laws of 1958,* the five borough presidents were all given two votes, and the city-wide officials were each given four votes. Through Chapter 761, *Laws of 1978,* the city-wide officials were each given two votes and the five borough presidents were each given one vote. As is detailed in the *Amicus* brief (pp. 11-13) and in the Maniscalco Affidavit, (¶¶ 20-23) the 1958 change in the voting structure gave cognizance to the tremendous population growth of Bronx, Queens and Staten Island. The Maniscalco Affidavit makes two very significant points on the 1958 change—first, even before 1958 when the Borough Presidents of Staten Island, Queens and Bronx had only one vote to two votes for the Borough Presidents of Manhattan and Brooklyn, the role of each Borough President was still significant, with his vote being able to influence the outcome of a close vote and each Borough President viewed as a full participant in the Board's deliberations (Maniscalco Affidavit ¶ 19); second, the 1958 change specifically rejected any move to raise the Queens and Bronx Borough Presidents to two votes while leaving the Staten Island Borough President with one vote, with the change applying to all boroughs, in order to maintain the treatment of all Borough Presidents as full participants in the Board's deliberations. (Maniscalco Affidavit ¶ 23)

18. It is most important to note, as pointed out in the McMillen Affidavit (¶ 17) and the Maniscalco Affidavit (¶ 24), that while the membership and voting structure of the Board of Estimate has changed little since the early 1900s, the powers that the Borough Presidents exert over their boroughs' affairs has diminished greatly. With the

reduction of the Borough Presidents' powers comes the heightened importance of a meaningful borough presence on the Board of Estimate. Indeed, as a former Borough President points out

> "the meaningful presence of each Borough President on the Board of Estimate [is] of paramount importance and indeed much more vital than during the years that the Borough President had enormous powers and a significant voice in the running of his borough." (Maniscalco Affidavit 24)

19. As I pointed out in the *Amicus* brief (pp. 20-24), the State concern that each borough have a meaningful voice in their governance is manifested not only by the treatment of the Borough Presidents in the Board of Estimate, but also in other legislation totally unrelated to the Board. Some of the examples of state statutes which carry out this state policy for meaningful borough role are:

(a) *The New York City Board of Education.* By virtue of Chapter 915, *Laws of 1973,* the New York City Board of Education is composed of seven members. Each borough president appoints one member who must reside in his borough and the Mayor appoints two members who can reside anywhere in New York City. I was intimately involved in the passage of this legislation, being the bill's Senate Sponsor. As is reported in the *Amicus* brief (pp. 20-23), there was stiff opposition to the borough appointments, with charges of the "perpetuation of petty borough oriented politics to the detriment of both city-wide and local community interests (*see* p. 22 of the *Amicus*

brief). We in the Legislature as well as the Governor rejected this charge, feeling that each borough, regardless of size, has the right to a meaningful role in the running of the City's educational system, with the only way to provide such meaningful borough presence being to give each borough one appointment. As is pointed out in the Regan Affidavit, (¶ *10*) the composition of the Board of Education has been a significant factor in the running a school system with close to 1 million students (more than the population of all but 6 cities in the United States) from diverse backgrounds and with distinct educational needs and problems. As is also pointed out in the Regan Affidavit (¶ *16*) this equal borough representation on the Board of Education has not resulted in any borough getting any more or any less than its fair share of educational dollars.

(b) *Port Authority Projects.* Chapter 651, *Laws of 1978* which granted to the Port Authority of New York and New Jersey the power to initiate major industrial development projects contains an important provision which also exemplifies this State policy of mixing City-wide interests with borough concerns. Although the statute gives the Port Authority sweeping powers regarding the location and types of projects in the bi-state region, it specifies that an area within New York City can only be included in the Port Authority's master plan after a request by the Mayor for a feasibility study of this location. Notwithstanding the Mayor's request, each Borough President can veto the location of any project to be located within his borough. (§ 7173 *New York Unconsolidated Laws*).

(c) *The Board of Trustees of the City University* (commonly known as the New York City Board of Higher Education). By state statute (§ 6204 *Education Law*), the Board of Trustees has seventeen members—ten appointed by the governor and five appointed by the Mayor (with two *ex-officio* members of the City University Student and Faculty Senate). Of the five mayoral appointments, there must be at least one from each borough; of the ten gubernatorial appointments, there must be at least one from each borough. As the Maniscalco Affidavit (¶ 25) points out, the philosophy behind the Board of Higher Education and the Board of Estimate is the same—effectively running the business of the City (or City University) while attempting to meet the needs of each component of the entity. Also, as the Maniscalco Affidavit (¶ 28) points out, the fact that the smallest borough has the same number of mandated appointments as the largest borough has not resulted in any borough receiving any more or any less than its fair share.

(d) *New York City Industrial Development Agency.* § 917 *General Municipal Law* provides that the New York City Industrial Development Agency must have on its board at least one resident from each borough.

(e) *New York City Industrial and Commercial Incentive Board.* § 489-bbb *Real Property Tax Law* which provides authorization for the creation of the New York City Industrial and Commercial Incentive Board, mandates that the borough president or his designated representative shall be a member of "such board for the purpose of taking action with respect to property located in his borough."

(f) *New York City Board of Elections.* § 3-200 *Election Law* established a New York City Board of Elections, consisting of ten commissioners, of which there must be two from each borough.

(g) *New York City Transit Authority Advisory Council.* § 1204-A of the *Public Authorities Law* created the New York City Transit Authority Advisory Council, with fifteen members, five of which shall be appointed upon the recommendation of each of the five borough presidents.

(h) *New York City Planning Commission.* § 192 *New York City Charter* established the New York City Planning Commission, with a Chairman and six members, with at least one from each borough.

20. As the preceding paragraphs have shown, in the years since the consolidation of New York City, the Legislature has enacted numerous laws aimed at guaranteeing each New York City borough a meaningful voice in their governance. These same years have seen a significant change in the local home rule powers applying to most of the sixty-two counties of the State, to all the counties except the five counties comprising New York City.

21. At common law, counties and towns were considered merely divisions of the State organized for the convenient exercise of portions of the political power of the State [(*Cleveland* v. *Lancaster*, 239 A.D. 263 *aff'd.* 264 New York 568 (1933)]. From the time of the 1894 New York State Constitution provision has been made for each county except for a county wholly included in a city "to elect a board of supervisors or other elective body." From

the time of that Constitution until 1963, there were only minor constitutional amendments relating to county form of governments, with no additional grant of local power. The truly significant change came in the 1963 New York State Constitution, with a new Article IX containing a "Bill of Rights for Local Governments."

22. *The Public Papers of Governor Nelson A. Rockefeller* (1962) at 824-825) contains the Governor's memorandum issued when the Concurrent Resolution proposing Article IX was introduced. The Article "provides for the first time a 'Bill of Rights for Local Governments'; broadens the existing home rule powers of counties, cities and larger villages . . . including a new concept of home rule powers, and free local government."

The Governor's memorandum notes that the new "Bill of Rights for Local Governments" embodies a new concept of state-local relations . . . expressly recognizing that the *'expansion of powers for effective local self-government is a purpose of the people of the state.'* The memorandum also states that the amendment *"provides guarantees against impairment of the powers of one municipality by the exercise of local legislative powers by another."* (*id.* at 825) (*emphasis added*)

23. *New York State Constitution* Article IX embodying this "Bill of Rights" for local governments was adopted in 1963. It is most significant to note that this Bill of Rights specifically applies to all counties "except those wholly included within a city" (the five counties of New York City are the only counties in the State wholly included within a city) and with all "the rights and powers of local governments specified in this section insofar as applicable to any county within the City of New York shall

be vested in such City." (Article IX § 1 *New York State Constitution, as amended*)

24. If the plaintiffs prevail in this lawsuit and the Board of Estimate is reapportioned according to borough population, Staten Island's Borough President would, in the words of the plaintiffs own expert, be "a mere observer in the Board's deliberations." (Kramarsky, "The Structure, Powers and Functions of New York City's Board of Estimate, *see* p. 27 *Amicus* brief). To deprive Staten Island of any right to influence this Board's determinations, which impact so significantly on this County, is in direct conflict with the spirit of the "Bill of Rights for Local Governments," which was passed to prevent the occurrence of just such a result. I voted for this "Bill of Rights" in the 1962 and 1963 legislative sessions (as did a majority of legislators and New York State voters in the 1963 general election). I was convinced of the need for constitutional guarantees to insure effective local self-government. I am equally convinced that if the result the plaintiffs are advocating in this lawsuit was anticipated by state officials in the early 1960s, this statute would never have been passed without the inclusion of safeguards for the self governance of all sixty two counties, including the five counties of New York City.

25. The result urged by the plaintiffs would effectively deprive the County of Richmond (which if a separate municipality would be [upon information and belief] the 2nd largest city in New York; the 35th largest city in the United States; and bigger than the NATO-member nations of Iceland and Luxembourg) of a meaningful voice in the determination of its future. With a Board of Estimate voting structure based upon county population the

practical result would be that the counties of Kings and Queens could control the fate of determinations that greatly affect the County of Richmond. This is certainly the opposite result than intended by Article IX of the Constitution which sought to provide "guarantees against impairment of the powers of one municipality by the exercise of local legislative power by another (see ¶ 22, *supra*). It is also in conflict with the sentiment expressed by the Court of Appeals in *Rathbone* v. *Wirth,* stating that "local governments even the smallest division of the State are the preparatory school in which the citizen acquires the rudiments of self government, and hence these institutions have been justly regarded as the nurseries of civil liberty" (15 N.Y. 459 at 487 (1896).

26. This affidavit has already shown the historical and state public policy reasons why the Board of Estimate's present voting system should remain undisturbed. There are two other basic reasons for leaving it unchanged—one, it is needed and two, it works.

27. As was recognized in the preface to the statute effecting consolidation there were tremendous problems commensurate with formulating a structure to govern this new Greater New York:

> "To fuse the multifarious powers, duties and functions of the various municipalities conceived, involving as they do the conveniences, the necessities, the nearest interests of 3,000,000 of people into a unit of government care and control was a task of no ordinary magnitude." (Greene, Preface to Chapter 378 *Laws of New York* at iv (1897).

28. The Greater New York of 1898 was unique within the country, was very large and was composed of diverse

and distinctly different parts. The New York City of 1985, as is shown in the Jaffe Affidavit (¶¶ 5, 6) is unique within the country, is large and is composed of diverse, distinctly different parts. The Borough of Staten Island is, in terms of geography, population, housing and community feeling very different from the other four boroughs (see Trautmann affidavit ¶¶ 16-20, 63, 64; Regan affidavit ¶¶ 12, 17, 18; *Amicus* brief pp. 24-27). New York City has long been a "showcase of American democracy and a haven for diverse groups; it has been a national symbol of success, and the financial, cultural and communications capital of the world" (*Final Report of the State Charter Revision Commission for New York City* at 1 (1975). Upon information and belief, the reasons prompting the 1900 Charter Revision Commission to give the Board its present composition, deeming it "proper that the Boroughs should have a direct representative on the Board" (*supra* at ¶ 13) are as valid today as they were in 1900.

29. The Board's makeup, purposely conceived to insure that "some of its members must be intimately familiar with the conditions and needs of the boroughs" (1936 *City Charter Revision Commission* at 15) is significantly similar to the composition of the City Council of Virginia Beach, Virginia. As is discussed at length in my *Amicus* Brief (pp. 29-32), the Supreme Court case of *Dusch* v. *Davis,* 387, U.S. 112 (1967) upheld the Virginia statute which provides that the council "shall consist of eleven members, one to be elected by the city at large from among the residents of each of the seven boroughs and four to be elected by and from the city at large" (Va. Acts of 1966, Chap. 39). The reasoning behind the composition of the Virginia Council is identical to the reasoning behind the

composition of the Board, namely the mixture of local and City wide interest. The Supreme Court's language in *Dusch* is, in my opinion, equally applicable to the Board of Estimate's purpose and justification, "[the plan] reflects a detente between urban and rural communities that may be important in resolving the complex problems of the modern megalopolis in relation to the city, the suburbia, and the rural countryside." (*Dusch* v. *Davis, Supra* at 117)

30. Indeed, as is (upon information and belief) stated in an affidavit by Mayor Edward Koch submitted in support of the Board of Estimate's voting structure, the Board operates very effectively in carrying out its functions in helping to govern this complex city, pointing out that in the mid 1970's the Board struggled with—but weathered—the most serious fiscal crisis with which any major American city has had to grapple in modern history.

31. A recent example that comes to mind of the Board effectively meeting a complex problem of the City was its vote concerning the construction of resource recovery plants within the City. On December 20, 1984 the Board voted for the construction of eight garbage burning recovery plants to be built throughout the five boroughs in the next thirteen years. The need for some long-term plan to deal with the City's 22,000 tons a day of garbage had long been recognized by City and State officials (*see* Chap. 560 Laws of 1980 entitled "Solid Waste Management Law"). While the need was acknowledged, the practical problem of where to build the plants, which would undoubtedly generate opposition from residents living near the proposed sites, remained. The vote to build eight

plants in specific locations within all five boroughs showed not only the Board's effectiveness in dealing with major city problems, but also the collegial nature of the Board, with the city-wide and borough officials deliberating to confront an issue. The resource recovery vote was passed with a vote of 8-5; the Mayor (with two votes), Queens Borough President Donald Manes, Bronx Borough President Stanley Simon, Manhattan Borough President Andrew Stein and Staten Island Borough President Ralph Lamberti, with one vote each all voted for passage; the other two city-wide officials, Comptroller Harrison Goldin and City Council President Carol Bellamy (each with two votes) joined with Brooklyn Borough President Howard Golden to vote against the plan. From newspaper accounts regarding the vote, it was clear that Comptroller Goldin was actively attempting to defeat the plan, stating that although he generally agreed with the plan, he opposed the location of the first resource recovery plant at the Brooklyn Navy Yard, near the Williamsburg section of Brooklyn (see Staten Island Advance 3/3/85 at 1). His involvement as a City wide official in what was in effect a purely local Brooklyn issue shows that it is not possible to categorize the membership of the Board on the basis of whether they are city wide or borough wide officials.

32. As this affidavit has shown, there are strong justifications for the present voting structure of the Board of Estimate to remain unchanged. The rational state policy of insuring a blend of Citywide interests with local concerns has been consistently applied to the Board since 1901 and is manifested through numerous state statutes aimed at assuring a meaningful borough voice in affairs which affect their borough. The Board's composition and

voting structure are needed to assist in the governance of this unique city which is the financial, cultural and communications capital of the world; the Board's composition and voting structure are needed to assure that the special needs and concerns of each borough, particularly Staten Island which is so different from the others, are met. A change in the Board's composition and voting strength would be a breach of an implied condition under which Richmond County gave up its own self governance and entered into Greater New York in 1898 and would result in the residents of the fastest growing N.Y.S. County, being deprived of a chance to influence decisions which have a great impact upon their county's future. I am reminded of a poem by a great poet who resided on Staten Island—in "Outwitted" Edwin Markham wrote:

> "He drew a circle that shut me out.
> Heretic, rebel, a thing to flout,
> But Love and I had the wit to win:
> We drew a circle that took him in"

If the plaintiffs' position prevails, a circle will have been drawn shutting the county of Richmond out.

33. Based upon the foregoing, I respectfully request that this Court find that these are sufficient policies and interests to justify the continuation of the present voting structure of the Board of Estimate.

/s/ John J. Marchi
John J. Marchi

Sworn to before me this 15th day of March, 1985

/s/ Patricia E. Perez
Notary Public

Exhibit (A): Annexed to the Affidavit of John J. Marchi

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81 Civ. 3920 (ERN)

BEVERLY MORRIS; JOY CLARKE HOLMES; JOANNE OPLUSTIL,

Plaintiffs,

—against—

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of New York, CAROL BELLAMY, as City Council President, HARRISON J. GOLDIN, individually and as Comptroller for the City of New York, HOWARD GOLDEN, ANDREW STEIN, STANLEY SIMON, DONALD MANES, RALPH LAMBERTI, each individually and as Borough Presidents of the boroughs of the City of New York,

—and—

FRANK V. PONTERIO,

Intervenor-Defendant,

ROBERT A. STRANIERE, individually and as a member of the New York State Assembly,

Intervenor-Defendant.

AFFIDAVIT OF LORING MCMILLEN

Exhibit A Annexed to the Affidavit of John J. Marchi

STATE OF NEW YORK,
COUNTY OF RICHMOND, SS.:

LORING MCMILLEN, being duly sworn deposes and states:

1. I reside in Richmond County, Staten Island, New York, having lived in Staten Island my entire life.

2. I was educated in the New York City public school system, and graduated from Union College, Schenectady, New York.

3. I am a licensed professional engineer, but have spent a good deal of my life pursuing my interest in local history.

4. I was the Founder and Director of the Restoration of Richmondtown, a typical small American 18th and 19th century community, the former county center of Staten Island.

5. From 1932-1978, I was the full-time director of the Staten Island Historical Society and the Richmond Restoration.

6. I have been the official Borough Historian of Richmond County for over fifty years, since 1934.

7. I have written several articles on local history and lectured extensively on the subject and am listed in "*Who's Who in the East*" and Who's Who in American Education.

8. I have researched carefully the various contemporary accounts contained in newspapers, histories and related

literature concerning the events leading up to and culminating in the establishment of the Greater City of New York in 1898.

9. I submit this affidavit in support of the defendant's position that history dictates that the composition and voting structure of the Board of Estimate remain unchanged.

10. Richmond County, comprising the whole of Staten Island was one of the original twelve counties of New York State (along with Albany, Cornwall, Dukes, Kings, New York, Orange, Queens, Suffolk, the Dutchess, Ulster, and Westchester). At the time of its consolidation into New York City, it was a steadily growing county, with a population of 65,000 in 1898 as opposed to 38,950 in 1880.

11. Prior to consolidation, Staten Island was governed under a system of county government with each of its townships (Northfield, Southfield, Westfield, Castleton and Middletown) electing a member of the governing Board of Supervisors, which chose its own president. Numerous officers were elected by the people on a countywide basis —county judge, surrogate judge, district attorney, sheriff, county clerk and treasurer.

12. In addition to the countywide offices, each town also elected four Justices of the Peace, a Board of Assessors, Tax Collector, Town Clerk, three Excise Commissioners, four Constables, and Highway Commissioner. There also were four incorporated villages on the Island at the time of consolidation, namely New Brighton, Edgewater, Port

Richmond and Tottenville. As an incorporated village, each was considered its own local government within the county framework and thus had its own elected board of trustees, health officer, clerk, treasurer and engineer.

13. In the late 1860s, talk began of expanding New York City by consolidation with surrounding areas. The leading advocate at this time was Andrew Greene, a Manhattan official. In 1890, the Legislature created a Commission (composed of persons appointed by the Mayor of New York, the Mayor of Brooklyn and the Board of Supervisors of Richmond, Queens, Kings and Westchester) to examine the possibilities of consolidation. The Commission recommended several bills regarding consolidation to the Legislature, and in 1894 one of those bills became law, providing for nonbinding referendum on the issue, to be voted by the people in the affected area. The result of the vote:

	For	*Against*
New York	96,938	59,959
Kings	64,744	64,467
Queens	7,712	4,741
Richmond	5,631	1,505
Westchester County		
Town of East Chester	374	260
Town of West Chester	620	621
Town of Pelham	251	155
Totals	176,170	131,708

Exhibit A Annexed to the Affidavit of John J. Marchi

14. From a review of the records of these times, particularly newspaper articles, it is clear that during the 1890s, before and after the 1894 referendum up to the consolidation in 1898 there was a great deal of discussion among Richmond county residents concerning the pros and cons of Richmond County entering into this consolidation. Hearings were held by the Commission on Consolidation and by the Legislative Sub-Committee. "The Republican" newspaper (2/5/1896) reports of the final hearing of a Legislative Sub-Committee at which Governor Flower, Andrew Green, and the leading Staten Island proponent of consolidation, George Greenfield were present. Some officials from New York and Brooklyn spoke against including Staten Island in the consolidation. After the anti-consolidationists spoke, a leading Staten Island consolidation advocate, Erastus Wiman addressed the committee, giving arguments not only in behalf of consolidation, but as to the wisdom of including Staten Island. Mr. Wiman stated that the geographical advantages of the waterfront of Staten Island could bring great benefit to the City and could save the City from a decline in its commerce.

15. According to an article from "The Republican," (4/8/1896), at another hearing before New York Mayor Strong, George Greenfield spoke at considerable length on the advantages which would result from consolidation. Greenfield stated that if Staten Island were not part of the consolidation plan, Richmond County will incorporate as a city of the second class, with plans "already being made to prepare ourselves for an independent municipality."

Exhibit A Annexed to the Affidavit of John J. Marchi

16. Indeed, as Mr. Greenfield stated above, there had been plans to pursue the option of Richmond County becoming an independent city. As is reported in "The Republican" (1/18/1896) a Committee on City Charter had previously been formed with George M. Pinny, Jr. as Chairman. The Committee has researched the issue of Richmond County becoming a city, and reported that under the State Constitution the cities of the state were divided into three classes, with the population of Richmond County fitting it into a city of the second class. The Committee also prepared a complete list of all statutes enacted affecting Richmond County, so that it might be prepared "for intelligent action" regarding what form of government the county should adopt. After a review of the work and the current state of the consolidation movement, the City Charter Committee in a report stated that there were two courses opened for consideration for Richmond County—an independent city or consolidation into Greater New York. This report submitted to the Board of Supervisors, recommended that no action be taken on being an independent city, deeming that such action would be "inexpedient . . . at the present time . . . in face of the Greater New York measure."

17. As history reveals, no further action was taken regarding independent city status on Staten Island, with consolidation of Greater New York, becoming effective on January 1, 1898 by the New York State Legislative enactment.

18. I have researched carefully the various contemporary accounts contained in newspapers, histories and related literature concerning the events leading up to and

Exhibit A Annexed to the Affidavit of John J. Marchi

culminating in the establishment of the Greater City of New York in 1898. Nowhere in the records, newspaper reports and various meetings was the question of adequate representation, either on the Board of Estimate or the then Board of Aldermen, now the Council raised. Obviously, Staten Island voters and leaders were satisfied that the Island, small in population as compared to the rest of the proposed boroughs, would be adequately represented.

19. In my opinion, the citizens and officials of Richmond County of the late 1890s would never have chosen to give up their own county form of government or their plans to pursue an independent city form of government if they knew, or even suspected that they or their successors would not have a meaningful voice in the major decisions that affected their county.

20. The consolidation in 1898 brought an end to Staten Island's incorporated villages and county government. The office of the Borough President replaced the Board of Supervisors, with the first Richmond Borough President, George Cromwell appointing the Commissioners of several borough departments to assist him. In the years that followed, through several charter revisions, the powers of the Borough Presidents were decreased substantially with many responsibilities shifted to the Mayor.

21. Staten Island has a large percent of the vacant land in the City of New York and a percentage of population growth far greater than in any of the other four boroughs.

Exhibit A Annexed to the Affidavit of John J. Marchi

In my opinion, in this critical period in our history a decrease in our voting power on the Board of Estimate, which controls the fate of this vacant land would be completely unrealistic and, in addition, would not be consistent with the spirit of those who in 1898 welcomed our admission into the Greater City of New York.

/s/ Loring McMillen
Loring McMillen

Sworn to before me this 13th day of March 1985.

/s/ Patricia E. Perez
Notary Public

Exhibit (B): Annexed to the Affidavit of John J. Marchi

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81 Civ. 3920 (ERN)

BEVERLY MORRIS; JOY CLARKE HOLMES; JOANNE OPLUSTIL,

Plaintiffs,

—against—

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of New York, CAROL BELLAMY, as City Council President, HARRISON J. GOLDIN, individually and as Comptroller for the City of New York, HOWARD GOLDEN, ANDREW STEIN, STANLEY SIMON, DONALD MANES, RALPH LAMBERTI, each individually and as Borough Presidents of the boroughs of the City of New York,

—and—

FRANK V. PONTERIO,

Intervenor-Defendant,

ROBERT A. STRANIERE, individually and as a member of the New York State Assembly,

Intervenor-Defendant.

AFFIDAVIT OF ALBERT V. MANISCALCO

Exhibit B Annexed to the Affidavit of John J. Marchi

STATE OF NEW YORK,
COUNTY OF RICHMOND, SS.:

ALBERT V. MANISCALCO, being duly sworn deposes and states:

1. I was born in New York City in 1907 and have lived in the City of New York my entire life.

2. I currently reside at 188 Major Avenue, Staten Island, N.Y.

3. I have been intimately involved with many phases of New York City and New York State affairs since the 1930's.

4. In 1938 I was elected to the New York State Assembly, representing an Assembly District on Staten Island. I served in the Assembly from 1938 until 1942.

5. From 1948 to 1953, I served as the borough secretary, Borough of Richmond. As borough secretary I was in charge of legislative matters concerning the Borough of Richmond and was designated to sit on the New York City Board of Estimate in the absence of the Borough President, who was then Cornelius Hall.

6. From 1953 to 1954 I was a member of the New York City Council.

7. From 1954 to 1965 I was the Borough President of the Borough of Richmond and in that capacity was a member of the New York City Board of Estimate.

Exhibit B Annexed to the Affidavit of John J. Marchi

8. From 1965 to 1968 I was a legislative consultant to the Speaker of the New York State Assembly, who was Anthony J. Travia.

9. From 1970 to 1972 I was a member of the Staten Island Community School Board.

10. From 1972 to 1975 I was a member of the New York State Charter Revision Commission for New York City.

11. From 1973 to 1984 I was a member of the Staten Island District Board of the Comprehensive Health Planning Agency, that is, the Health Systems Agency of New York City.

12. From 1976 to 1985 I was a member of the New York City Board of Higher Education.

13. The purpose of the New York City Board of Estimate is very different from that of the New York City Council. While the Council acts as the general legislative body of the City, the Board of Estimate functions in those areas concerned with the City's property, franchises and contracts. The Board of Estimate is similar to the board of directors of a large corporation, operating to keep the business of the City running as efficiently as possible.

14. The role of the individual members of the Board of Estimate is similarly quite different from the role of an individual City Council member. Unlike members of the Board of Estimate, a Councilman sits on the Council representing an individual portion of the City. When I served as the City Councilman from Staten Island I was

Exhibit B Annexed to the Affidavit of John J. Marchi

present on the Council representing my Staten Island constituents and doing all possible for what I perceived to be the good of my constituency.

15. By virtue of my being the Richmond Borough President I was a member of the Board of Estimate: with Staten Island's interests being of paramount importance: but my role as a member of the Board was never limited to a Staten Island constituency. I always viewed my role on the Board as a New Yorker sitting as a member of the board of a corporation running the City's business. I often remarked that when I went into the Board of Estimate's meeting I took off my exclusively Mr. Staten Islander hat and put on my Mr. New Yorker from the Borough of Staten Island hat. I believe that this view of the role of the members of the Board of Estimate was shared by the other members of the Board, including the other Borough Presidents, as well as the Mayor, Comptroller and City Council President.

16. To carry the corporate analogy a little further, the vice president for budget of General Motors, for example, might by virtue of his title be a member of the board of directors of General Motors. That vice president spends most of his working hours performing his budgetary functions. However, at Board meetings, he becomes one of a team of directors. Similarly, as Staten Island Borough President I spent most of my time attending to Staten Island matters; however, when I attended those bimonthly Board of Estimate meetings, I was there to deal with City matters and I did so not as merely a local borough president but also as a member of the Board of Estimate for the entire City.

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17. Although each member of the Board of Estimate is acting for the City as a whole when dealing with matters that come before the Board of Estimate, obviously if a matter dealt with a particular area of expertise of an individual member, the other members would turn to that member for guidance. For example, if a particular use of city land in Queens was a matter on the Board of Estimate calendar while I was on the Board, I would be guided by the opinion and expertise of the Queens Borough President, James Crisona, since he was from that borough and was obviously more familiar with its needs and interests than the other members of the Board. Similarly, if a matter was before the Board which involved land use on Staten Island, the other members of the Board, whether they were borough presidents or city wide officials, would turn to me for counsel and would give my views a great deal of weight. My voice was heard not just because of my local expertise, but because I was a full participant with the ability by my vote to influence the outcome of an issue. If I was not a full participant, but was there without any ability to influence a vote, my ability to effectively sway someone else's vote would have been eliminated.

18. In the many years that I served on the Board of Estimate, I observed many other members of the Board, there by virtue of their position as city wide officials or borough wide officials. How an individual member would vote on a particular matter could not be predicted merely on the basis of the way they obtained board membership. For example, there were numerous times a citywide official would interject himself into a matter that was purely

Exhibit B Annexed to the Affidavit of John J. Marchi

local, that is, affects only one borough. Similarly, if a matter had an exclusive impact on Staten Island I would present the same pitch for support to the Borough Presidents as I would to the Mayor, Comptroller and City Council President.

19. For the first four years that I served on the Board of Estimate (and in the four years that as Borough Secretary I was the Borough President's designated representative on the Board), the votes of each Borough President on the Board were not the same. The Borough Presidents of Manhattan and Brooklyn had two votes each, while the Borough Presidents of Richmond, Queens and the Bronx each had one vote. The Mayor, Comptroller and City Council President each had three votes. This voting structure had been in place since 1900 and had not, in my opinion, served to diminish the role that the Borough Presidents of Richmond, Queens and the Bronx had in the Board's deliberations. With one vote, I and the Borough Presidents of Queens and Bronx could still individually influence the outcome of a close vote. Furthermore, my opinion and expertise on matters relating to my borough was, I believe given the same credence and weight by the other Board members in their deliberations whether I cast one or two votes when the matter was eventually voted upon. Since I was a meaningful participant able to influence the outcome of a vote. If, however, I only had 1/6 of a vote, I would have no meaningful presence and would not have, I believe, been treated as a credible Board member.

Exhibit B Annexed to the Affidavit of John J. Marchi

20. In 1958 the voting structure of the Board of Estimate was changed for the first time since the turn of the century. The change was the result of legislation introduced by Assemblyman J. Lewis Fox of Far Rockaway, Queens.

21. The original bill introduced by Assemblyman Fox amended the voting structure on the Board by changing the vote of the Borough Presidents of Queens and Bronx from one to two, leaving the Richmond Borough President with one vote and the Manhattan and Brooklyn Borough Presidents with two (and the Mayor, Comptroller and City Council President with three votes). *In this original bill, for the first time since the consolidation of New York City, Staten Island would be singled out and treated as a second class member on the Board of Estimate.*

22. Through discussions with the Mayor and the other members of the Board of Estimate, it was agreed that the Fox bill should be amended to include Staten Island, thus giving all the Borough Presidents two votes. The New York City Council agreed with this and sent the necessary home rule message to the State Legislature, which resulted in Chapter 719, Laws of 1958.

23. The reason advanced by those who first supported Assemblyman Fox's bill was that the tremendous change in the population of the outer Boroughs justified those boroughs being given the same vote as the boroughs of Manhattan and Brooklyn. In my opinion, the main reasoning behind the Board of Estimate, the City Council,

Exhibit B Annexed to the Affidavit of John J. Marchi

the State Legislature and the Governor supporting the final version which treated all the Borough Presidents equally was the recognition of the role, functions and workings of the Board of Estimate. The "Board of Directors" of the corporate city of New York had worked together to run the complex business of the City of New York by combining local borough concerns with city wide needs. Even before any change in the voting structure, each director, whether he sat on the Board by virtue of his Borough or City office, had a vital role in the operation of the Board and could influence the outcome of a vote on any issue, whether it involved a city wide or purely local matter. To change the voting structure for all but one member would have been perceived as relegating that member to less than full status and would have undermined his ability to carry out effectively his role. However, even before the change was made in 1958, I and other Borough Presidents who had one vote, were able to act as effective members of the Board. If, however, I or my successors were given only 1/6 pf the vote of the Brooklyn Borough President, our role on the Board would be rendered meaningless and the Board's ability to deal with the entire City would be greatly diminished.

24. Although the membership and voting structure of the Board of Estimate has changed little since the early 1900's the powers that the Borough Presidents possess over the affairs of their Boroughs have dramatically changed since the time of consolidation. The substantive powers of each borough president have been drastically reduced, making the meaningful presence of each Borough President on the Board of Estimate of paramount im-

portance and indeed much more vital than during the years that the Borough President had enormous powers and a significant voice in the running of his borough.

25. The philosophy behind the operation of the Board of Estimate is very similar to other bodies that govern the affairs of the City of New York; for example, the Board of Trustees of the City University (commonly known as the New York City Board of Higher Education) governs and administers all educational units of the City University. By state statute the board of trustees consists of seventeen members—ten appointed by the Governor and five by the Mayor, the two other trustees are ex-officio, being the chair-persons of the City University Student Senate and Faculty Senate. Of the ten Gubernatoral appointments, there must be at least one resident from each of the five boroughs. Of the five appointed by the Mayor, there also must be at least one resident of each borough. I served as one of the five mayoral appointments on the Board from 1976 to 1985.

26. The analogy between the composition of the City University Board of Trustees, with its ten borough appointments and seven city wide appointments and the composition of the Board of Estimate, with its five Borough Presidents and three city wide officials, is obvious. The philosophy behind the two boards is also the same—effectively and fairly operating the business of the city by meeting the needs of the whole entity while meeting the needs of each component of the entity. When I served as a Trustee of the City University, my role was not as a representative of the City University component on Staten

Island, the College of Staten Island, rather, my role was as a Trustee for the entire system, to facilitate meeting the educational needs of the entire city. If a matter came before the Board that impacted upon the College of Staten Island, my opinion would be sought by the other members just as within the Board of Estimate.

27. In my experience those Trustees who were appointed as a city wide appointment acted no differently in carrying out their duties than those who were appointed on the basis of their borough residency. An example that comes to mind is the issue of a City University medical college to be located in Queens. The two present Staten Island members of the Board of Trustees, Margaret Titone and Louis Cenci, took opposite views when the question of such a college came up for a vote—Margaret Titone voted against its creation, stating that it was not in the interest of the City University system, however, Louis Cenci voted in favor of its creation. The fact that Mrs. Titone or Mr. Cenci are from Staten Island and not Queens was irrelevant to their functioning as trustees for the good of the entire City University.

28. The fact that Staten Island has the same number of Borough appointments on the Board of Trustees as the other more populous boroughs has not in my experience, resulted in the educational institutions or the students on Staten Island receiving any more than their proportional fair share and similarly has not resulted in the more populous boroughs receiving less than their proportional fair share.

Exhibit B Annexed to the Affidavit of John J. Marchi

29. This affidavit has shown the collegial nature of the Board of Estimate and the importance of retaining the Board's present composition and voting strength to insure that it can carry out its function of meeting city wide problems while addressing local concerns.

/s/ Albert V. Maniscalco
Albert V. Maniscalco

Sworn to before me this 14th day of March, 1985.

/s/ Patricia E. Perez
Notary Public

Exhibit (C): Annexed to the Affidavit of John J. Marchi

UNITED STATES DISTRICT COURT

Eastern District of New York

81 Civ. 3920 (ERN)

Beverly Morris; Joy Clarke Holmes; Joanne Oplustil,

Plaintiffs,

—against—

The Board of Estimate, The City of New York, Edward I. Koch, individually and as Mayor of New York, Carol Bellamy, as City Council President, Harrison J. Goldin, individually and as Comptroller for the City of New York, Howard Golden, Andrew Stein, Stanley Simon, Donald Manes, Ralph Lamberti, each individually and as Borough Presidents of the boroughs of the City of New York,

—and—

Frank V. Ponterio,

Intervenor-Defendant,

Robert A. Straniere, individually and as a member of the New York State Assembly,

Intervenor-Defendant.

Affidavit of James F. Regan

Exhibit C Annexed to the Affidavit of John J. Marchi

STATE OF NEW YORK,
COUNTY OF RICHMOND, ss.:

JAMES F. REGAN, being duly sworn deposes and states:

1. I reside in Great Kills, Staten Island, New York, and have been a resident of Staten Island since infancy.

2. I have received a Bachelor of Science degree from Fordham University, earned graduate credit in American History and Labor Relations at New York University, earned a Masters degree in Personnel and Guidance from the College of Staten Island and received an honorary Ph.D. from St. John's University. I taught in the New York City public school system for seventeen years as a social studies teacher at two Staten Island high schools, Curtis and New Dorp, where I also served as Dean of Students.

3. Since 1972, I have been a member of the New York City Board of Education, first appointed by Borough President Robert Connor and reappointed by Borough President Anthony Gaeta, both of Staten Island. In 1973, I was elected by my fellow board members to serve as Vice-President of the Board; in 1974-1975, I served as its President. I was again elected President of the Board in 1983 and 1984, and currently hold that position.

4. I have served as Mayor Lindsay's, Mayor Beame's and Mayor Koch's appointee to the New York City Teachers Retirement Board. Since 1978, I have been a member and chairman of the New York State Permanent Commission on Public Employee Pension and Retirement Systems, currently serving in my second five year term.

Exhibit C Annexed to the Affidavit of John J. Marchi

5. Since 1978, I have served as the Board of Education's representative to the Council of Great City Schools, an organization representing the thirty-two largest urban school systems in the United States. I have been elected, and currently serve as a member of the Executive Committee and Board of Directors of the Council of Great City Schools.

6. It is my view that the current composition and voting structure of the New York City Board of Estimate must be maintained, and I submit this affidavit in support of the defendants' position.

7. The New York City Board of Education is similar to the New York City Board of Estimate in its composition (with Borough and City-wide representation) and, in the collegial nature of its deliberations.

8. Pursuant to New York State statute (Education Law § 2590-b), the New York City Board of Education is composed of seven members. The five Borough Presidents each appoint one member and the Mayor appoints two members. Each of the five Borough President appointees must be a resident of the borough from which the Borough President appointing him was elected, while the two "members at large" must only be residents of New York City.

9. The members of the Board annually elect the officers of the Board.

10. The New York City Board of Education has overall responsibility for the entire city school system, which

for the 1984-1985 school year has a student population of over 930,000 students (which by the way is more than the entire population of all but six cities in the United States.) The Board approves recommendations of the Chancellor relating to course and curriculum requirements and allocates through the Chancellor funds to community school boards on the basis of established formulae, Board members meet in special committees during the week and as a Committee of the Whole on each Wednesday. These are working sessions for the formulation of policy for the entire City school district, including the thirty-two decentralized community school districts in the city; the discussion of award of contracts; the receipt and disbursement of funds; personnel matters; issues of collective bargaining; and litigation and appeals, most of which must be acted upon pursuant to State Education Law by the Board at a public meeting. Public calendar meetings are held on the first and third Wednesdays of the month and a public agenda meeting is conducted on the third Wednesday of the month. With as large and diverse a student population and geographic area to serve (unique in many ways within the country), this is not an easy task. That the system runs reasonably well is due to a large part to the make-up of the Board, with each borough's needs and problems being represented and voiced.

11. The State statute also mandates that there shall be a community school board for each community school district whose boundaries are defined by the Board. The Board may alter or readjust district lines only once in every third year, following the criteria enumerated in the state law. These criteria include the common and special

educational needs of the Communities, the suitability of the size of the district for efficient policy making and geographic contiguity, with a specific mandate that the boundaries of any district not cross county lines (with the exception of District 10 in the Bronx, which has historically included a little portion of Manhattan).

12. The Board of Education is charged with the responsibility for the entire city district of close to one million students, with diverse needs and backgrounds. This task would be impossible to perform with any degree of success without each borough's needs and concerns having a meaningful voice. For example, the educational needs and school transportation needs of students in Travis, Staten Island are often different from those of the students in Bedford-Stuyvesant, Brooklyn. Since Board decisions impact upon all students and teachers within the entire city district, the Board must make those decisions with the knowledge and understanding of the needs of all the borough's educational communities.

13. While kindergarten through Junior High School programs are implemented by community school districts, there are certain schools and programs where the City Board, after reviewing district and city-wide needs, establishes programs which are open to all city students regardless of residency (generally a student's school is determined by his residency). For example, there are schools in the city school district that are established to meet special educational needs of pupils and are open to all city students on the basis of criteria (For example Bronx High School of Science, Stuyvesant High School (which

this year had two Westinghouse Science Award winners out of forty nationally) and LaGuardia High School of Music and the Arts based on competitive testing; vocational and technical high schools based on aptitude tests; and city-wide programs such as attendance improvement and drug prevention based on need).

14. In my thirteen years on the Board, I have worked with many "borough appointees" and "at large appointees," and have noticed no pattern which differentiates the two groups when it comes to Board deliberations. Merely because a member is appointed "at large" has not restricted that member from concerning himself (some more forcefully than others) in a matter that involves only one borough, or one school within that borough. Understandably, if a significant borough matter is being considered, the member from that borough as well as any member who lives in that borough are usually the most informed and vocal and take the lead. For example, through the late 1970s and early 1980s a project that has been of great importance to me was the construction of a new New Dorp High School on Staten Island. In gaining the support of fellow Board members for that project, whether the member was a borough appointee from the Bronx or an "at large" appointee who resided in another borough was irrelevant to his or her listening to the merits and deciding if it were best for the City school district as a whole.

15. The fact that a member is a borough rather than an "at large" appointee is not a significant factor in my being able to persuade him or her to vote on the merits

of a certain issue; however the fact that I, as a borough appointee from Staten Island have a full vote and thus a meaningful presence on the Board is a significant factor. If I had only a fraction of the vote of the members from other boroughs, I could not be a full participant and would have little influence in the matter.

16. Although Staten Island, the smallest borough, has the same vote on the Board as each of the other boroughs, it is important to note that this has never resulted in Staten Island receiving more than its proportional share of the educational dollar. Nor to my knowledge has any other borough received more or less than its fair share.

17. The New York City school district is different in many respects from other school districts in the county and the Staten Island community school district is different from other districts in the City. The racial mix of the student population is different, transportation needs are different (Staten Island has a much greater percentage of students walking or using automobiles to get to schools —students parking is a problem to be faced in Staten Island but not to the same extent in other boroughs); reading scores are proportionately higher, and the Regents Scholarship scores are proportionately higher.

18. The Staten Island district is different from the rest of the city district because Staten Island is different from other boroughs. Although Staten Island is the fastest growing borough (gaining in population while the rest of the City is losing population) and indeed the fastest growing county in the State, it is still a suburban community

Exhibit C Annexed to the Affidavit of John J. Marchi

with a very real sense of community. This sense of community is illustrated by the fact that although Staten Island has a large enough student population (over 30,000) to separate into two districts (and thus be eligible for a separte district office with additional administrative expenses of approximately $400,000 to $500,000 annually), the district has purposely remained as one. On Staten Island, the district is considered the entire region, the whole borough, the educational community. The entire Staten Island community is united in its belief that remaining as one unified district is in the best interests of our children and our community.

/s/ James F. Regan
James F. Regan

Sworn to before me this 15th day of March, 1985.

/s/ Patricia E. Perez
Notary Public

Exhibit (D): Annexed to the Affidavit of John J. Marchi

UNITED STATES DISTRICT COURT

Eastern District of New York

81 Civ. 3920 (ERN)

Beverly Morris; Joy Clarke Holmes; Joanne Oplustil,

Plaintiffs,

—against—

The Board of Estimate, The City of New York, Edward I. Koch, individually and as Mayor of New York, Carol Bellamy, as City Council President, Harrison J. Goldin, individually and as Comptroller for the City of New York, Howard Golden, Andrew Stein, Stanley Simon, Donald Manes, Ralph Lamberti, each individually and as Borough Presidents of the boroughs of the City of New York,

—and—

Frank V. Ponterio,

Intervenor-Defendant,

Robert A. Straniere, individually and as a member of the New York State Assembly,

Intervenor-Defendant.

Affidavit of Les Trautmann

Exhibit D Annexed to the Affidavit of John J. Marchi

STATE OF NEW YORK,
COUNTY OF RICHMOND, ss.:

LES TRAUTMANN, being duly sworn deposes and states:

1. I reside at 101 Highland Avenue, Staten Island, New York and have lived on Staten Island for most of my life.

2. I obtained a Bachelor of Arts degree in English from Wagner College, a Master of Science Degree in Journalism from Columbia and an honorary Doctor of Human Letters degree from St. Johns University.

3. I have been involved in the newspaper business since 1938, when I worked as a correspondent for various New York Metropolitan area newspapers. Since that time, I have worked exclusively for various newspapers, with the exception of the four years that I was in military service. For two of the years I was in the U.S. Army, I was assigned to the Southwest Pacific where I founded seven different Army publications including the 100,000 circulation Daily Pacifican. Since 1965, I have served as Editor-in-Chief of the *Staten Island Advance,* a Newhouse publication.

4. In addition to my duties at the newspaper, I hosted for two years a WNYC-TV show entitled "Staten Island Today."

5. Over the years I have been involved with numerous community organizations and am currently a member of the Wagner College Board of Trustees, a member and secretary of the Bayley Seton Hospital Board of Trustees

Exhibit D Annexed to the Affidavit of John J. Marchi

and a member and vice-president of the Staten Island Family Services Board of Directory.

6. I am a member of numerous professional groups, including the American Society of Newspaper Editors, the New York State Society of Newspaper Editors and the Associated Press Managing Editors Society and I am listed in *Who's Who in America, Who's Who in Commerce and Industry* and the Dictionary of International Biography.

7. I submit this affidavit in support of the position that the Board of Estimate's current voting structure is not only justified but of grave importance to assuring that the needs and concerns of all the boroughs are effectively met. This justification, particularly as it relates to Staten Island can be seen through the history of the consolidation of Staten Island into New York City, as well as through the numerous indicia that Staten Island is a community which is distinct from the rest of the City.

8. Richmond County is comprised entirely of Staten Island and was one of the original twelve counties of New York State, established as a county in 1683.

9. Staten Island's relations with New York City date back more than a century. In the mid-1860s, New York City established metropolitan police, sanitary and health districts that encompassed Richmond County (Staten Island), but these were abolished in 1870.

10. In the 1880s, a movement grew to consolidate New York, Brooklyn and surrounding territories. According to

Exhibit D Annexed to the Affidavit of John J. Marchi

papers in the Staten Island Historical Society, Staten Island at that time was divided into four towns—Northfield, Southfield and Westfield, three divisions dating Colonial days and Middletown, which was organized in 1860. The county also included several villages, New Brighton, Edgewater and Port Richmond, which were incorporated in 1866, and Tottenville, which was incorporated in 1894. All towns and villages had elected officials.

11. These historical papers show that the consolidation move on Staten Island was supported by the property owners who argued that the Island could supply the city with port facilities, cheap land for manufacturing centers and housing for working people.

12. The move toward consolidation, historical papers show, gained ground when one George J. Greenfield was appointed by the Richmond County Board of Supervisors to represent Staten Island on the Municipal Consolidation Committee.

13. The issue was put to a vote in 1894. Historical papers show that voters complained of poor roads, inadequate sewers, taxes that didn't raise enough money; they indicated voters wanted more schools and better police and fire protection.

14. Whereas the vote was in favor of consolidation in Brooklyn by only 277 votes, Staten Islanders favored it by a vote of 5,531 to 1,505.

15. Consolidation became a reality on January 1, 1898.

Exhibit D Annexed to the Affidavit of John J. Marchi

16. The Staten Island of today, just as the Staten Island of the 1890s is an anomaly, a suburban borough in sharp contrast to the other four urbanized boroughs of New York City.

17. This uniqueness of Staten Island is sustained beyond the visitor's perception and is borne out by the demographics. There is a special homogenity in the way of life. Almost everything about Staten Island is sharply different from the rest of the city.

18. As a striking example, it has the only remaining daily community-oriented newspaper left in New York City. *The Staten Island Advance* publishes seven days a week, with emphasis on local news, and outsells by a considerable margin the combined sales of the *New York Times*, the *Daily News* and the *Post* on Staten Island. Four surveys by Belden Associates of Dallas, Texas, show that nine out of ten adults in this borough read it daily, or 240,000 readers 18 years of age or older.

19. The studies and the surveys indicate that this uniqueness of Staten Island is its very peril if it were to have less than an equal voice on the city's Board of Estimate. Under the present Board, Staten Island is able to obtain as high as seven percent of the municipal budget for infrastructure—vitally needed for a burgeoning county, the fastest growing in the state. This is needed, for example, because most of Staten Island still lacks sanitary sewers.

20. Staten Islanders rely mostly on automobiles. It has no subways and its municipal bus system is mediocre.

Exhibit D Annexed to the Affidavit of John J. Marchi

Other than taking a roundabout route by car through New Jersey, the Staten Island physical connections with the rest of the city are restricted to a five-mile municipal ferry ride or a drive (no pedestrians) over the two-mile Verrazano-Narrows Bridge.

21. One of the major roles of the Board of Estimate is the determination of land use. This is vital in the future of Staten Island, which is still an estimated ten years from being "built out," or all available acreage used. Thus, the Board's land-use power is of enormous importance.

22. Even with an "equal voice" on the Board of Estimate, Staten Island has had a most difficult time in gaining the infrastructure it needs for a sharply increasing population, a rare trend within New York City, and in fighting off undesirable projects. Most of Staten Island, for example, still lacks municipal sanitary and storm sewers. Septic tanks overflow in the streets; many streets are impassable when it rains because there is no arranged runoff. The world's largest "landfill" (garbage dump) is projected by the Sanitation Department to reach a height of 500 feet with 15 years on the Island's West Shore. The highest natural elevation on Staten Island (Todt Hill in the center of the Island) is 410 feet. Mid-rise apartment projects have been erected in some of the older sections to dwarf older residences and throw the racial mix far out of balance. Most Island streets have not been taken over officially by the city and thus remain thinly and inadequately surfaced. One can imagine the horrors if the Island had no meaningful voice on the Board of Estimate.

Exhibit D Annexed to the Affidavit of John J. Marchi

23. The strikingly suburban characteristics of the Borough of Staten Island are demonstrated in the survey made by Belden Associates of Dallas, Texas, in October and November, 1984, and commissioned by the Staten Island Advance. These statistics are for the total market according to Belden, and not just for Advance readership. Belden allows up to a 3 percent margin of error:

a. These people are 91 percent white.

b. 29 percent are college graduates, 15 percent have part-college and 43 percent are high school graduates.

c. 19 percent have one child, 19 percent have two children, and 9 percent have three or more.

d. 53 percent have incomes above $30,000, another 15 percent have income between $20,000 and $29,999. Only 6 percent are below $10,000.

e. 32 percent of the chief wage earners work in Staten Island, 26 percent in Manhattan, 10 percent in Brooklyn, 5 percent in New Jersey. (Richmond County is, I believe, the only county in New York State in which a significant portion of its residents leave the state to work).

f. 61 percent live in one-family homes, 30 percent in two-family homes, and 9 percent in apartments, condos or co-ops. This is in sharp contrast to the other boroughs. While Belden Associates reports 75 percent of Staten Islanders own their own home, the city Housing Preservation and Development Department reports these figures for the other boroughs: Queens, 37 percent owner-occupied; Brooklyn, 22 percent owner-occupied; the Bronx, 14

percent owner-occupied, and Manhattan, 9 percent owner-occupied.

g. The marital figures for Staten Islanders are: 69 percent married, 7 percent widowed, 6 percent separated or divorced and 17 percent single, never married.

h. 46 percent of the women work.

24. These statistics already show the disparities between the style, social climate and needs of Staten Island in contrast to the other four more urban boroughs and why Staten Island's special interests and development would be submerged or ignored were the Board of Estimate weighted in terms of population only.

25. In my opinion Staten Island cannot count on politics, the ballot box, to redress wrongs or to seek the right.

26. Like the rest of the city, Staten Island is overwhelmingly Democratic in registration. Unlike the rest of the city, Staten Islanders are notorious ticket-splitters despite 87,000 registered Democrats and 43,000 registered Republicans.

27. The Republicans have a congressman, a state senator and an assemblyman (until this year the only Republican Assemblyman in New York City). The Democrats control two Assembly seats, the two City Council seats, the borough presidency and the district attorney's office.

28. From these election figures, one can easily discern why the ruling party, the Democrats, in the City will rarely

court or show intense interest in the Staten Island electorate:

a. In the 1984 presidential election, Ronald Reagan captured 66 percent of the vote on Staten Island and Walter Mondale received 34 percent. The percentages—all for Mondale—in the other four boroughs were: Manhattan, 72; the Bronx, 68; Brooklyn, 62, and Queens, 53.

b. In the 1982 gubernatorial election, Democrat Mario Cuomo carried Staten Island with a fraction of a point more than 50 percent over Lew Lehrman, the Republican. The pro-Cuomo voting elsewhere in the city was the Bronx, 72 percent; Brooklyn, 67 percent; Queens, 60 percent; Manhattan, 74 percent.

c. In the 1981 mayoral election, the disparity was not so great. In fact, Edward I. Koch ran better on Staten Island than he did in the rest of the city, 79 percent against 72 percent. The party breakdown reveals more. On Staten Island, Koch, the Democrat, received 54 percent and Koch, the Republican, drew 24 percent. In contrast, the citywide figures for Koch, the Democrat were 58 percent and Koch, the Republican, only 14 percent.

d. The ticket-splitting characteristic is typified by the 1984 election. Ronald Reagan took 66 percent of the vote, while Republican Rep. Guy Molinari took 70 percent. A Republican assemblyman won 77 percent, but a Democratic assemblywoman won 58 percent and a Democratic assemblyman won 60 percent.

29. Two conclusions should be obvious from the above election results—one that Staten Island rarely enjoys any

Exhibit D Annexed to the Affidavit of John J. Marchi

political clout and, perhaps more significantly, that the voters of this county vote for their perceptions of what or who is good for their community, regardless of party affiliation.

30. Staten Island is largely service-oriented with private sector employment concentrated in the medical field and in education (including three colleges). There is only one industry of any significance, Proctor and Gamble situated on the northwest shore; the second largest is a container-ship operation.

31. Staten Island was hailed for years as "the last frontier" of the city because of its undeveloped acreage. The last 15 years have seen extensive home construction with planners now asserting, that Staten Island may be "built-out" within a decade. How the Board of Estimate deals with this vast undeveloped land in the next ten years will irrevocably determine the character of this county.

32. It is this land-use perogative of the Board of Estimate that leads to extensive debate and often disgruntlement within the populace. Hi-rise construction is generally viewed with distaste and disdain and since, according to a recent housing survey, Staten Island has the highest apartment vacancy rate in the City, it is arguably not the type of land use that should be approved by the Board for the Borough.

33. These land-use subjects are among the leading ones covered by the Staten Island Advance.

Exhibit D Annexed to the Affidavit of John J. Marchi

34. The Advance, not so coincidentally, also focuses on something else, which shows a particular Staten Island aspect. While other boroughs have leftover community designations, such as Park Slope and Bay Ridge in Brooklyn, these designations still retain high importance in Staten Island. Only recently have the boundary lines become somewhat blurred in some instances, but there is great community insistence, with civic group activity, in these "town" designations, such as St. George, Tottenville, New Dorp, Great Kills and many others. They come up repeatedly in land-use discussions and planning. Despite these town designations, residents still think of themselves as "Islanders."

35. The Advance, significantly, deals heavily with homes and gardens, local educational opportunities, the development of local cultural institutions and, on a much broader basis, the preservation of trees and park areas. The most outstanding of the latter is the preservation of a 2,000 acre "Greenbelt," running East to West across the center of the Island which after twenty years of negotiations is now only being determined by statute.

36. According to the 1980 census, New York City, with its approximately 7,000,000 people, has a larger population than any other city in the United States and is larger than 41 states. The census also indicates that there are only six cities in the U.S. with a larger population than each of the four largest N.Y.C. boroughs. If the smallest borough, Staten Island, was a separate city, it would be the 41st largest city in the United States, larger than, for example, Miami, Florida; Austin, Texas; Denver, Colo-

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rado; Norfolk, Virginia; Providence, Rhode Island; Richmond, Virginia.

37. New York City is unique and Staten Island is, as this Affidavit has shown, unique within New York City. Staten Island must maintain its full vote and meaningful presence in the Board of Estimate to maintain its current suburban character.

/s/ Les Trautmann
Les Trautmann

Sworn to before me this 12th day of March, 1985.

/s/ George E. (Illegible)
Notary Public

Exhibit (E): Annexed to the Affidavit of John J. Marchi

UNITED STATES DISTRICT COURT

Eastern District of New York

81 Civ. 3920 (ERN)

Beverly Morris; Joy Clarke Holmes; Joanne Oplustil,

Plaintiffs,

—against—

The Board of Estimate, The City of New York, Edward I. Koch, individually and as Mayor of New York, Carol Bellamy, individually and as City Council President, Harrison J. Goldin, individually and as Comptroller for the City of New York, Howard Golden, Andrew Stein, Stanley Simon, Donald Manes, Anthony Gaeta, each individually and as Borough Presidents of the boroughs of the City of New York,

—and—

Frank V. Ponterio,

Intervenor-Defendant.

Robert A. Straniere, individually and as a member of the New York State Assembly,

Intervenor-Defendant.

Affidavit of David Jaffe

Exhibit E Annexed to the Affidavit of John J. Marchi

STATE OF NEW YORK,
COUNTY OF RICHMOND, ss.:

DAVID JAFFE, being duly sworn deposes and says:

1. He is an attorney at law and a member of the law firm Marchi Jaffe Cohen Crystal Rosner & Katz located at Two Wall Street, New York, New York 10005 and at 358 St. Marks Place, Staten Island, New York 10301.

2. He resides in New York County (Manhattan) and has resided in that County for over 20 years.

3. He has resided in New York City all his life except for service in the United States Navy during World War II and while attending college.

4. This affidavit is submitted to that area of the Second Circuit Court of Appeals decision which directed the District Court to "rule on the policies and interests which the Supreme Court has held *may justify deviations* from the literal one person one vote formula" in conjunction with the Court in footnote 3 noting "the fact that three members of the Board are elected at large from the entire city raises *novel issues* as to how an individual voter's opportunity to elect these members should be assessed in conjunction with his opportunity to elect his borough representative." (Emphasis added)

5. Your deponent asks this Court to take Judicial Notice of the volumes of statistical data (including census materials) official reports of Federal, state and local governments, foundation reports, scholarly publication and

Exhibit E Annexed to the Affidavit of John J. Marchi

media reports which clearly demonstrate that New York City is different from any other governmental entity in the United States and is recognized as the *"Big Apple"* and is the magnet and mecca for people throughout the world. The following information is submitted upon information and belief.

(a) New York City's present population is approximately 7,000,000 people. It is larger than any other city in the United States and is larger than 41 states. The four largest New York City boroughs individually would rank higher in population than all but six United States cities. The Borough of Staten Island, the smallest of the five boroughs, if it were a separate city, would rank as the 41st largest city in the United States, larger than, for example, Miami, Florida; Austin, Texas; Denver, Colorado; Norfolk, Virginia; Providence, Rhode Island; and Richmond, Virginia. (*The World Almanac and Book of Facts* 1985).

(b) The budget of New York City, $17.2 billion in 1984, is bigger than the budgets of 48 states and is bigger than the budget of numerous countries, including Argentina; Columbia; Denmark; Greece; Hungary; India; Ireland; South Korea; Norway; Pakistan; Peru; Portugal; Switzerland; Thailand and Turkey.

6. The following information is set forth on information and belief. (The source of the information and belief is the 1980 Census, documents obtained from the City of New York, and the Legislative Institute, newspaper articles and various other documents.)

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(a) The Statue of Liberty standing in New York Harbor has been a symbol of New York City and the United States since it was constructed in 1886. It has been a beacon of light and a ray of hope for all the people of the world. On the Statue Emma Lazarus' immortal words appear:

> "Give me your tired, your poor, your huddled masses yearning to free, wretched refuse of your teeming shore, send these, the homeless, tempest—tossed to me. I lift my lamp beside the golden door."

New York City has in fact been the Golden Door and received these masses of people as well as some of the wealthiest people in the world.

(b) In the 1980 Census, 733,325 classified themselves as other than U.S. Citizens, i.e. aliens. In the same year the number of aliens registered with the Immigration and Naturalization Service was 603,000, which is estimated to be 75% of the statewide total. It is estimated that an additional 500,000 illegal aliens resided in New York City in 1980 but neither registered with the INS nor respond to the Census. (This figure is considered speculative; *see* letter from New York City Department of City Planning to your deponent dated March 7, 1985, annexed as Exhibit 1; see also, *N.Y. Times* story dated 1/24/85.) It appears that at this time there is a minimum of 1,100,000 to 1,233,325 aliens residing in New York City.

(c) New York City has an estimated 85% of the State's homeless population; 66% of the State's welfare population and 62% of the State's Medicaid re-

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cipients. (Office of the Mayor, *Perspectives on the New York City Budget and the Roles of its Fiscal Partners—The State and Federal Governments* at 7, February 1985).

(d) In 1982 one out of every four recipients fell below the federal poverty level as compared to one out of eleven in the rest of the State. While New York City's population has declined by 823,000 (10.4%) from 1970-1980 the number of residents below the federal poverty level increased by 227,000. (*id.*)

(e) New York City levies 13 taxes which are not levied anywhere else in the State including personal income tax. (The city of Yonkers is now in the process of levying a personal income tax.) (*id.* at 4)

(f) The combined Federal, state and local income taxes paid by *families* (husband and wife) in New York City earning $50,000 exceeds those paid by similar families in other cities. This is also true of *families* in other income levels. Additional taxes paid by New York City families compared to "Middle Atlantic City" is $1,820 more and in "New England City" is $2,114 more. (*id.*)

(g) For New York City *families* earning $100,000 the comparable figures paid over "Middle Atlantic City" is $3,440 and "New England City" is $4,937. (*id.*)

(h) If the federal tax deduction of state and local tax is passed as presently proposed by the Federal Administration, New York City residents' taxes relative to other localities as referred to above would be

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even higher. As an example, a family earning $50,000 residing in New York City would pay $2,692 more than a "Mid Atlantic City" and $3,131 more than a "New England City"; and for a *family* earning $100,000 residing in New York City would pay $5,889 more than the "Middle Atlantic City" and $8,469 more than a "New England City." (*id.*)

(i) A comparison of the 1970 and 1980 Census reveal there was a population loss of over 823,000 persons from New York City in that decade. Among the five boroughs, Staten Island is the only one which gained population, with a 19% increase. The City's white nonhispanic population declined from 4,972,509 to 3,668,845, a loss of 1,303,564 or 26%. (City Planning Commission, *Capital Needs and Priorities for the City of New York* at 11, March 1983)

The 1980 distribution of population of New York City is as follows:

POPULATION CHARACTERISTICS—NEW YORK CITY
1980 CENSUS STF2—SELECTED FULL COUNT DATA

	No.	%
Total Population	7071639	100.000
White Nonhispanic	3668945	51.880
Black Nonhispanic	1694127	23.950
Hispanic Origin or Descent	1406024	19.880
Asian, Pacific Islanders Nonhisp	225862	3.190
American Indian Nonhispanic	8583	0.120
Other Nonhispanic(1)	68098	0.960

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By County:

POPULATION CHARACTERISTICS—THE BRONX
1980 CENSUS STF2—SELECTED FULL COUNT DATA

	No.	%
Total Population	1168972	100.000
White Nonhispanic	396836	33.940
Black Nonhispanic	348744	29.830
Hispanic Origin or Descent	396353	33.900
Asian, Pacific Islander Nonhisp	14468	1.230
American Indian Nonhispanic	1664	0.140
Other Nonhispanic(1)	10907	0.930

POPULATION CHARACTERISTICS—BROOKLYN
1980 CENSUS STF2—SELECTED FULL COUNT DATA

	No.	%
Total Population	2230936	100.000
White Nonhispanic	1085233	48.640
Black Nonhispanic	689626	30.910
Hispanic Origin or Descent	392118	17.570
Asian, Pacific Islander Nonhisp	41793	1.870
American Indian Nonhispanic	2431	0.100
Other Nonhispanic(1)	19735	0.880

POPULATION CHARACTERISTICS—MANHATTAN
1980 CENSUS STF2—SELECTED FULL COUNT DATA

	No.	%
Total Population	1428285	100.000
White Nonhispanic	713854	49.970
Black Nonhispanic	290218	20.310
Hispanic Origin or Descent	336247	23.540
Asian, Pacific Islander Nonhisp	71242	4.980
American Indian Nonhispanic	1917	0.130
Other Nonhispanic(1)	14807	1.030

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POPULATION CHARACTERISTICS—QUEENS
1980 CENSUS STF2—SELECTED FULL COUNT DATA

	No.	%
Total Population	1891325	100.000
White Nonhispanic	1172511	61.990
Black Nonhispanic	341059	18.030
Hispanic Origin or Descent	262422	13.870
Asian, Pacific Islander Nonhisp	91892	4.850
American Indian Nonhispanic	1118	0.110
Other Nonhispanic(1)	12113	1.120

POPULATION CHARACTERISTICS—STATEN ISLAND
1980 CENSUS STF2—SELECTED FULL COUNT DATA

	No.	%
Total Population	352121	100.000
White Nonhispanic	300511	85.340
Black Nonhispanic	24480	6.950
Hispanic Origin or Descent	18884	5.360
Asian, Pacific Islander Nonhisp	6467	1.830
American Indian Nonhispanic	343	0.090
Other Nonhispanic(1)	1436	0.400

(j) The Black population is approximately 25.2% of the total population. (*id.*)

(k) The Hispanic population is approximately 20% (19.9) of the total population. (*id.*)

(l) While the overall population of New York City declined by over 10% from 1970-1980 Richmond County's population increased by over 19%. (*id.*)

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(m) New York City had 2,784,524 registered voters in 1960; 3,027,714 in 1970 which declined to 2,237,190 in 1980, a net loss of 790,524 voters or 26.1% since 1970. Richmond County had 72,424 registered voters in 1960 and had 112,755 in 1980 or a net gain of 40,331 voters or 54.9%. (Exhibit 2, Prepared by Legislative Institute)

7. The following is based upon deponent's recollection of events. In 1953 the Democratic Party selected a white male as their candidate for Borough President of Manhattan. The Liberal party followed suit and selected a white male candidate for that office. The Republican party nominated a Black male for Borough President of Manhattan. The Democratic and Liberal Parties then nominated Black male candidates for Borough President. As a result Manhattan (New York County) elected the first minority (Black) Borough President in 1953. Bronx County elected a minority (Hispanic) Borough President in 1965. During his first years in office the first Black Borough President of Manhattan had more voting power on the Board of Estimate than the Borough Presidents of Staten Island, Queens and the Bronx. Subsequently, the minority Borough Presidents of Manhattan and Bronx were replaced by white Borough Presidents. The other three boroughs have never elected a minority Borough President.

8. Howard Golden is the present Borough President of Brooklyn (Kings) and its Democratic County Chairman. It appears he is a candidate for reelection.

Exhibit E Annexed to the Affidavit of John J. Marchi

9. Donald Manes is the present Borough President of Queens and its Democratic County Chairman. It appears he is a candidate for reelection.

10. A minority (Black) candidate who is a county wide official has declared for Borough President of New York County (Manhattan) and upon information and belief is deemed to be the favorite to win that office. In addition, upon information and belief based on media reports, a minority (Hispanic) candidate will declare his candidacy for Borough President of the Bronx.

11. Upon information and belief if either or both of the minority candidates for Borough President of Manhattan or the Bronx is successful and the Plaintiffs' position is sustained minority representation, which has been absent from the Board of Estimate for years, will be sharply reduced in power, effect, reality and perception because the voting power of the Borough of Manhattan and the Bronx will be substantially reduced due to the population differential between Brooklyn and Queens.

12. Upon information and belief, the revenues generated by Manhattan and Staten Island support the rest of the City, with Manhattan a large net revenue *producer*, Staten Island a moderate net revenue *producer*, Queens a moderate net revenue *loser*, and both Brooklyn and Bronx large net revenues *losers*.

13. Upon information and belief if the Plaintiffs' position is sustained the political balance of the Board of Estimate will shift from equality among the Boroughs to a

Exhibit E Annexed to the Affidavit of John J. Marchi

Board that is strongly weighted in favor of Brooklyn and Queens. This will change not only the whole political complexion of City government but will change the whole future economic development of the City, the metropolitan area and the region.

14. In thinking about the possible effect on the City of New York of changing the voting structure and composition of the Board of Estimate, your deponent is reminded of H.G. Wells' statement on the decline of the Roman Empire: "The essence of its failure was that it could not sustain unity . . ." [*The Outline of History*, Vol. 1, Chap. 26 at 399, (1920)].

15. The information set forth in this affidavit and others submitted in support of the *Amicus'* position not only shows the novel aspects of the City of New York but that it is *sui generis* and why the present governance of the City including the present makeup of the City Board of Estimate should be kept.

/s/ David Jaffe
David Jaffe

Sworn to before me this 13th day of March, 1985.

/s/ James P. Donohue, Jr.
Notary Public

Affirmation of Susan R. Rosenberg, Read in Further Support of the Defendants' Position dated March 15, 1985

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81 Civ. 3920 (ERN)

BEVERLY MORRIS, et al.,

Plaintiffs,

—against—

THE BOARD OF ESTIMATE, et al.,

Defendants.

—and—

FRANK V. PONTERIO,

Intervenor-Defendant,

—and—

ROBERT A. STRANIERE, etc.,

Intervenor-Defendant.

ATTORNEY'S AFFIRMATION

SUSAN R. ROSENBERG, an attorney duly admitted to practice in the courts of this State, affirms to the truth of the following under penalty of perjury:

1. I am an Assistant Corporation Counsel in the office of Frederick A. O. Schwarz, Jr., Corporation Counsel of the City of New York, attorney for defendants (other than intervenor-defendants). I am fully familiar with the

facts and circumstances of this action and make this affirmation in further support of defendants' position herein.

2. On August 21, 1984, this Court issued a memorandum and order in which the Court excluded from its computation of malapportionment on the Board of Estimate the presence of the three citywide members of the Board. Based upon an examination of the respective populations of each of the five boroughs, the Court found that there exists on the Board of Estimate a 132.9% maximum deviation from population equality.

3. As the Court is aware, defendants continue to respectfully disagree with the Court's determination to exclude the presence of the three citywide members of the Board in determining whether the Board is malapportioned, and if so, to what degree. Moreover, while the Second Circuit remanded this case to this Court to determine, *inter alia,* "the weight of the state interests alleged to justify whatever level of deviation exists," the Court of Appeals additionally directed this Court to consider "whether the combination of at-large and local seats, in the context of the voting procedures of the Board, creates a system of representation that satisfies constitutional standards for instruments of local government." *Morris* v. *Board of Estimate,* 707 F. 2d 686, 690 (2d Cir. 1983). As to the latter question, we have previously set forth the reasons why we believe that the Board's voting structure and composition is constitutionally acceptable. As we pointed out in our Memorandum of Law dated October 26, 1983, (pp. 15-16, 29-32), the voting structure and voting patterns of the Board compel the conclusion that

no borough representative has a disproportionate share of power on the Board.

4. Defendants nonetheless recognize that under this Court's order of February 13, 1985, it is incumbent upon them to present sufficient reasons which would justify the existence of a 132.9% maximum deviation from population equality on the Board. We have previously provided our reasons why we believe that number is justified, (see Joint Stipulation of Policies and Interests served by the Board of Estimate, dated October 18, 1984) and note that while plaintiffs may disagree with them, they are not in disagreement with the facts. In addition, annexed hereto is an affidavit submitted by the Hon. Edward I. Koch, Mayor of the City of New York, and an affidavit submitted by the Hon. Ralph Lamberti, Borough President of Staten Island. Because it is clear that remodeling the Board's voting structure in order to comply with one person, one vote would have a devastating impact upon the citizenry of Staten Island, virtually eviscerating that borough's representation on the Board, Borough President Lamberti in his affidavit sets forth the reasons why, particularly from Staten Island's perspective, the 132.9% deviation is justifiable.

Dated: New York, New York
March 15, 1985

/s/ SUSAN R. ROSENBERG
Susan R. Rosenberg
Assistant Corporation Counsel

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

SUSAN R. ROSENBERG, being duly sworn, says that on the 22nd of March, 1985, she served the annexed Affirmation of Susan R. Rosenberg, Affidavit of Edward I. Koch and Affidavit of Ralph J. Lamberti upon the attorneys for the respective parties as listed below, by depositing a copy of the same, enclosed in a postpaid wrapper in a post office box in the Borough of Manhattan, City of New York.

Richard Emery, Esq.
Attorney for Plaintiffs
New York Civil Liberties Union
132 West 43rd Street
New York, New York 10036

Frank V. Ponterio, Esq.
Intervenor-defendant *pro se*
766 Pelton Avenue
Staten Island, New York 10310

Hon. Robert A. Straniere
Intervenor-defendant *pro se*
182 Rose Avenue
Staten Island, New York 10306

Hon. John Marchi
Amicus Curiae
358 St. Mark's Place
Staten Island, New York 10301

Affirmation of Susan R. Rosenberg

Alan Rothstein, Esq.
Amicus Curiae
Citizens Union
198 Broadway
New York, New York 10038

/s/ Susan R. Rosenberg
Susan R. Rosenberg

Sworn to before me this 22nd day of March, 1985.

/s/ Norma Kerlin

Annexed to the Affirmation of Susan R. Rosenberg
Affidavit of Edward I. Koch

UNITED STATES DISTRICT COURT

Eastern District of New York

81 Civ. 3290 (ERN)

Beverly Morris, et al.,

Plaintiffs,

—against—

The Board of Estimate, et al.,

Defendants.

Affidavit of Edward I. Koch

State of New York,
County of New York, ss.:

Edward I. Koch, being duly sworn, deposes and says:

1. I am the Mayor of the City of New York and have served as such since 1978. I also serve as one of the three citywide members of the Board of Estimate. I am familiar with the facts and circumstances of this action and submit this affidavit in support of defendants' position in this case.

2. I continue to agree with defendants' contention that the amalgam of Citywide and borough representation on the Board is constitutional, and that this Court erred in not taking into account the presence of the three citywide members of the Board and considered instead only the

populations of the five boroughs in determining whether the Board is constitutionally structured.

3. There can be no doubt that the Board of Estimate is, as presently constituted, an important and useful part of New York City's government. As has been previously pointed out many times in this case, the Board operates very effectively in carrying out its functions in helping to govern this complex city. Indeed, in the mid-1970's, the Board struggled with—but weathered—the most serious fiscal crisis with which any major American city has had to grapple in modern history.

4. Moreover, during the time in which I have had the honor and pleasure of serving as Mayor, my office has never received a complaint (other than that in this case) that the citizenry of any borough or community has felt disenfranchised or underrepresented as a consequence of the Board's structure and composition. I attribute this to not only the presence of the three citywide members of the Board, but also to the sensitivity of all the Board members to maintaining a sense of perspective and fairness in voting upon matters considered by the Board. Although this Court has opted to separate the citywide and borough members of the Board in determining the degree of malapportionment present, the Board does not operate under such a two-tier system.

5. Rather than cause turmoil and foment dissension in a City that has been consolidated for nearly a century, and rather than promoting divisiveness among its five

borough members, I respectfully request that the Court treat the Board as it would a still ticking, old and treasured timepiece, and leave its inner workings undisturbed.

/s/ EDWARD I. KOCH
Edward I. Koch

Sworn to before me this 20th day of March, 1985.

/s/ SUSAN R. ROSENBERG
Notary Public

Annexed to the Affirmation of Susan R. Rosenberg
Affidavit of Ralph J. Lamberti

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81 Civ. 3290 (ERN)

BEVERLY MORRIS, et al.,

Plaintiffs,

—against—

THE BOARD OF ESTIMATE, et al.,

Defendants.

AFFIDAVIT OF RALPH J. LAMBERTI

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

RALPH J. LAMBERTI, being duly sworn, deposes and says:

1. I am the Borough President of Staten Island, and have served as such since November, 1984. Prior to taking office as Borough President, I served as Deputy Borough President of Staten Island for ten years. As Borough President, I also serve as member of the Board of Estimate.

2. I am familiar with the facts and circumstances of this action and submit this Affidavit in support of defendants' contention that there are significant and justifiable reasons why the current composition and voting structure of the Board should be retained.

Affidavit of Ralph J. Lamberti Annexed to the Affirmation of Susan R. Rosenberg

3. Initially, I must reiterate that the other boroughs and their residents suffer no injury or prejudice by reason of the Borough President of Staten Island having one vote on the Board of Estimate. On the other hand, to deprive the Borough President of that one vote will result in irreparable injury to the approximately 360,000 residents of Staten Island. This can be demonstrated by the voting structure of the Board, the role played by the one vote assigned to Staten Island, and the ever present fact that citywide officials elected by all the voters have a majority of the votes on the Board.

4. Of the eleven votes on the Board, the three citywide officials, the Mayor, Comptroller and City Council President, elected by all of the voters of the City, have two votes each, for a total of six. Each Borough President has one vote for a total of five. Two citywide officials must be present at meetings to constitute a quorum and six votes constitute a majority. The smallest combination of two Boroughs which can effect a majority occurs when the Borough Presidents of Staten Island and the Bronx combine with two citywide members. As the Court has been apprised in previous argument, in 13,325 votes of the Board between February 3, 1980 and March 18, 1983, that combination occurred on only one solitary occasion, and resulted in no prejudice. Yet, in order for that combination to exist, the votes of two citywide officials elected by all the voters were required.

Ignoring even the *de minimus* instance of that combination, it is obvious that even the most populous borough, Brooklyn, is never injured by the one vote of the Staten Island Borough President.

The presence of the votes of citywide officials having a majority of the votes on the Board, in practice, prevents the domination of the full Board from being in the hands of officials representing a minority of the population of the city. The one vote of the Borough President of Staten Island is nevertheless vital to the residents of Staten Island.

5. Decisions of the Board of Estimate are made by an intricate process of give and take among its members. This is a political reality and is particularly true, for example, in the case of the capital budget in which each Borough President seeks support for projects in his or her Borough. In this connection, during my experience the Board has responded to community needs, without prejudice to any particular borough, time and time again. In the truest sense of the word, and in the best sense, it is a political body.

The Board's role in formulating the City's annual budget is, to many, one of its principal functions. Expenditures of money and allocation of resources have consistently been distributed along population lines. Each borough receives what it needs and generally deserves. With the citywide officials in control of the votes, such distribution is guaranteed. Were it to happen otherwise, the imbalance would undoubtedly be rectified on election day. It is unimaginable that the Mayor, Comptroller or City Council President could win reelection by giving fifty percent of the City's resources to Staten Island, while providing only a token to Brooklyn. Yet, with an equal vote to each borough, each borough is afforded the opportunity to fight for its fair share. Also, in the case of

less desirable aspects of City life, such as the siting and establishment of sewage plants, correctional institutions, or other controversial projects, the give and take among the Borough Presidents each having one vote assures that they are shared equitably.

If the vote of the Borough President of Staten Island on the Board were reduced in proportion, for example, to its size to Brooklyn, the vote would be approximately 1/6 of the vote of Brooklyn. In such case, under no circumstances would the Borough President of Staten Island hold a meaningful or influential vote; the responsibility of effectively representing Staten Island's interest would become virtually impossible. The Borough President of Staten Island would be relegated to the position of bystander in sessions of the Board. In that all important function of political give and take resulting in the adoption of capital budgets and other matters, the Borough President of Staten Island would not even be a participant.

The result then, should plaintiffs prevail, to cure an injury that does not and cannot in fact exist, would be to disenfranchise 360,000 residents of Staten Island.

The Court of Appeals, I understand, suggested that the presence of the three citywide members on the Board presents "novel issues" involving the application of the one-person, one-vote principle. I respectfully submit that the safeguard against Borough domination by the presence and voting strength of the citywide members on the Board is of sufficient consequence that it ought to be considered in resolving the "novel issues" in support of the Board's present structure.

6. I understand plaintiffs have suggested that the borough as an entity is a "historical anomaly" (Joint Stipu-

lation, p. 4, no. 4) and that conflicting local interests make it impossible to fairly represent all the residents of the borough. Insofar as Staten Island is concerned, I respectfully disagree. As Borough President of Staten Island, I represent *all* of its residents. Our borough has experienced a surge in population in recent years: in 1980, our population was 352,121, but by 1983, according to latest census estimates, our population had increased to 367,200. Notwithstanding our growth, however, Staten Island is still a relatively homogenous community and has a strong historic tradition as a borough. Moreover, the residents of Staten Island, as well as the residents of other boroughs, are concerned with streets, sewers, schools, hospitals, borough budgets, jails, sewage treatment plants, homeless, transportation, and similar matters in or out of their *own* borough, and not necessarily in another. Our residents, from the North to the South Shore, and from the East to the West Shore, share common interests and concerns.

Although composed historically of various towns, the residents of Tottenville do not live in isolation from the residents of St. George; the residents of Rosebank are not isolated from the residents of Travis, and the towns remain too small and geographically undefinable to have developed consistently competing interests which would preclude fair representation at the borough level. A State agency's plans to site a major garbage and coal burning power plant with demonstrably excessive levels of chemical and biological pollution increments in Staten Island's Travis area was of concern to all Staten Islanders. The outrage and tenacity of residents throughout the Borough in reaction to the prospect of such a facility eventually

led to the demise of this proposal. The relocation of the College of Staten Island from one community to another, a proposal presently under consideration, involves the concerns of all Staten Islanders, not only those of the affected communities. The proposal a few years ago to close the Public Health Hospital in the Clifton section of Staten Island was objected to by Staten Islanders from every community, not only those residing in the Clifton section. Across the board citizen involvement eventually led to the continuation of this facility as a private, major medical facility servicing the entire borough. Based upon my experience, and endless list of issues demonstrating the oneness of this borough's population could be cited. The towns and communities of Staten Island are uniquely interwoven and the borough as an entity can hardly be characterized as a "historical anomaly."

7. I understand that the degree of justification needed to preserve the Board's current structure may depend, at least in part, upon the extent of malapportionment found by the Court. I also understand that the formula used by the Court to determine the extent of deviation from population equality did not take into account the presence of the citywide members on the Board. I respectfully submit that their presence and participation as Board members cannot be ignored and should be taken into account. To do otherwise results in an unrealistic and artificially high quantification of Board malapportionment. The role, power, and responsibilities of the citywide members are no different than that of the Borough Presidents. The Board of Estimate is a collegial body. The eight members interact with each other in the business of the Board, and the citywide

representatives cannot be isolated as an entity separate from the borough representatives.

Board members, regardless of the size of their constituencies, act upon local issues, as well as issues of citywide concern. During my ten years of participation in the business of the Board of Estimate, I have witnessed numerous occasions wherein citywide representatives were the advocates for or against an issue of purely local concern to an individual borough. For example, the Comptroller recently came to the aid of Brooklyn's Williamsburg community to oppose siting the first resource recovery plant in that community; the Mayor was a principal supporter of the Charlotte Street housing development in the Bronx, a matter of special concern to Bronx citizens familiar with the need for the rehabilitation of that community; a citywide member led the fight to revitalize Manhattan's Times Square area. In each instance, the stance taken by the citywide member bore no relationship to broad citywide concerns, or to the citywide member's fundamental role in city government, i.e., Mayor, Comptroller, or City Council President. He or she was simply performing as an advocate for a particular neighborhood. Such occurrences are commonplace. Citywide members do not function in a vacuum. In effect, the citywide members provide each borough with an additional level of representation.

The Court of Appeals, I am informed, has alluded to the need to examine the issue raised by the present Board's "blending majority control with minority representation." The "minority representation" mentioned by the Court, I submit, was not an ethnic or racial minority, but a numerical minority, i.e., the Borough of Staten Island.

8. It should also be noted that much of the Board's work involves decisions on the disposition and use of public land. Because of this, the Borough President represents the community's interest in real property, trees, and all other natural assets located within the geographical boundaries of a borough. Most of the City's undeveloped land is on Staten Island. As Borough President, I must give a high priority to the preservation of a significant portion of this land for public educational and recreational use. In doing so, a benefit inures not just to Staten Islanders, but to all residents of the City. We have a greenbelt of natural lands, a scout camp used by children throughout the City and Long Island, a zoo which hosts school children bussed in daily, an island wildlife preserve, and other amenities of considerable social value. Support for and interest in these facilities exists in small pockets throughout the City, none of which alone is sufficient to ensure their preservation and development. Only by combining these interests in the context of a borough identity and borough pride can these important interests be served. In a sense, I represent certain interests of people throughout the City, not just on Staten Island. There is strong reason to maintain the boroughs as representational entities.

9. In much the same way that I must have a meaningful voice on the Board to protect Staten Island's natural assets, I must also be able to protect the health, safety, and welfare of its residents. Staten Island's undeveloped land and its remoteness from the rest of the City has for decades provided an irresistible temptation to dump every imaginable undesirable project on our shores. Study after

study has demonstrated that Staten Islanders have an excessive incidence of lung cancer. There can be little doubt that a major contributing factor is the high toxic pollution of our air. Yet, within the past few years alone, not only were we confronted with plans to site a major coal-and-garbage-burning power plant here, but also to construct a coal-slurry terminal and pipeline which would have destroyed waterfront and neighborhood properties on two Island shores. With the anticipated closing of all other City landfills, there are now plans to continue to pile garbage at Fresh Kills until it reaches a height of 500 feet, higher than the highest natural surface on the Island. Even with an equal vote on the Board, our success in fending off these life-threatening intrusions has been marginal. These are not matters merely of personal annoyance or evidence of a "not in my backyard" mentality. They are clear and present dangers to the well-being of my constituents.

10. Staten Island has long been considered and treated by others as the unwanted borough of the City. Although our borough, like Manhattan, is an island, we lack Manhattan's business center and large population and therefore remain geographically isolated from the remainder of the City. In fact, a comparison of the populations of the five boroughs between 1980 and 1983 reveals that while Manhattan's population actually decreased (from 1,427,533 to 1,425,300), as did the Bronx's (from 1,169,115 to 1,153,600) and Brooklyn's (from 2,230,936 to 2,226,600), only our borough and Queens showed an increase in population. The population in Queens, however, increased from 1,891,325 to only 1,900,800. Thus, based on the numbers

set forth above, although we are the least populous borough, we are also the fastest growing. Clearly, under these circumstances, any reduction in our representation on the Board would be grossly unfair and detrimental to our interests.

11. It should be noted that prior to the institution of this lawsuit, none of the Borough Presidents from the more populous boroughs ever complained that they were unable to represent their constituents because their vote was mathematically disproportionate to the Borough Presidents representing the less populous boroughs. The city-wide members never complained about the voting structure of the Board. It should also be noted that Mayor Edward I. Koch has urged this Court to leave the inner workings of the Board "undisturbed." (See Koch *affid.* ¶ 5). Comptroller Harrison Goldin is similarly in support of the Board as presently structured. (See Exh. A) City Council President Carol Bellamy, who is currently completing her final year of public service as City Council President, is not supportive of the present Board structure.

12. It has been said that the structure and composition of the Board of Estimate is unique. The Board of Estimate in its present form has reponded well to the needs of the people of the City of New York. The city is an amalgam of extremely diverse smaller governmental entities. This amalgam of regional and urban qualities is reflected in many aspects of the city's government, including the Board of Estimate as presently constituted. It is important that each citizen in the city have a right to meaningful representation. To apply the traditional formula to de-

Affidavit of Ralph J. Lamberti Annexed to the Affirmation of Susan R. Rosenberg

termine compliance with the one person-one vote principle without consideration to the various justifications hereinabove discussed, would be nothing more than an exercise in basic mathematics. It is difficult to believe that the authors of the *Reynolds* decision in 1964 ever intended that the principle enunciated therein should have such rigid application as to now disenfranchise the people of Staten Island. I respectfully submit that there is ample justification to sustain the Board of Estimate as presently composed, and urge the Court to find in favor of the defendants.

/s/ Ralph J. Lamberti
Ralph J. Lamberti

Sworn to before me this 19th day of March, 1985.

/s/ Ann M. Upton
Notary Public

Affirmation of Richard Emery, Read in Support of Summary Judgment, dated April 12, 1985

UNITED STATES DISTRICT COURT

Eastern District of New York

81 Civ. 3290 (ERN)

Beverly Morris, et al.,

Plaintiffs,

—against—

Board of Estimate, et al.,

Defendants.

I, Richard Emery, being duly admitted to practice law in the State of New York, affirm as follows:

1. I, along with Arthur Eisenberg, am counsel for the plaintiffs in the above-entitled action. I submit this affirmation in accordance with this Court's direction as outlined in its opinion, *Morris* v. *Board of Estimate,* 592 F. Supp. 1462, 1475, 1478 (E.D.N.Y. 1984) as well as pursuant to the February 13, 1985 stipulation of the parties and *amicus curiae.* This affirmation responds to the affidavits and exhibits filed on March 22, 1985, by the defendants and *amicus curiae* Marchi. This affirmation completes plaintiffs' submission in support of summary judgment.

3. The affirmation which follows is lengthy. Therefore, I will briefly provide here a summary in the nature of a table of contents. The affirmation will proceed as follows:

Procedural Background

EVALUATING THE PURPORTED JUSTIFICATIONS

A. INTRODUCTION

B. THE EVIDENCE SUBMITTED BY DEFENDANTS AND AMICUS MARCHI

(1) The Affidavit of Staten Island Borough President Ralph Lamberti

(2) The Affidavit of Assemblyman Robert Straniere

(3) State Senator John Marchi's Affidavit And Exhibits

C. CATEGORIZING THE PURPORTED "INTEREST" IN SUPPORT OF THE CURRENT BOARD

(1) Historical Factors

(2) Natural Boundaries

(3) The Integrity of Political Subdivisions

(4) The Effectiveness of the Board

(5) Meaningful Participation By the Lesser Boroughs in Board Affairs

(6) A Check on Executive Authority

CONCLUSION

PROCEDURAL BACKGROUND

4. In response to the opinion of the Second Circuit opinion in this case, *Morris* v. *Board of Estimate*, 707 F. 2d 686 (1983), the plaintiffs moved for summary judgment. In support of that summary judgment motion, plaintiffs filed numerous affidavits and exhibits as well as an extensive memorandum arguing that the current Board of Estimate representational scheme deviated from population equality, and therefore equal voting power among individual voters, by a far greater percentage than has ever before been judicially accepted. Plaintiffs further contended that no single, or combination of, justifications among those advanced by defendants and *amicus curiae* Marchi could justify such a gross deviation from fair voting strength among citizens. Finally, plaintiffs argued that a scheme, such as the Board of Estimate's, which by definition is unresponsive to population changes, cannot be squared with one person, one vote principles, especially in light of viable and available alternative schemes which satisfy the interests and policies for effectively governing New York City. See Memorandum of Law, December 16, 1983, and Appendix in Support of plaintiffs' Motion for Summary Judgment.

5. After the motion for summary judgment was filed, the parties agreed that the Court should bifurcate its disposition: first determining the appropriate mathematical methodology to evaluate deviations from voting equality inherent in the current Board scheme; and, second, deciding whether any acceptable justifications exist in the Board of Estimate scheme which could justify such deviations.

6. In this Court's August 21, 1984, opinion the mathematical methodology was fixed for assessing the percentage deviation from population equality. 592 F. Supp. at 1470-75. The Court found the deviation to be 132.9%. Thus, the first prong of the bifurcated procedure for ruling on the plaintiffs' motion was complete.

7. As to the disposition of the second prong of the motion—an investigation of potential justifications for deviations—the Court directed the parties to explore the specific interests underlying other litigated representational schemes in several recent cases, as well as any other interests which may be applicable in this case. 592 F. Supp. at 1475. The Court pointed to the interest of municipal boundaries, the integrity of various political subdivisions, compact districts of contiguous territory, natural boundaries, intergovernmental coordination, political interests, the effectiveness of the Board and meaningful participation by the lesser populated boroughs in Board affairs. 592 F. Supp. at 1477.

8. The proceedings since this Court's last opinion have been directed primarily at resolving this remaining question. To that end, on October 18, 1984, the parties submitted to the Court a "Joint Stipulation of Policies and Interests Served By the Board of Estimate" in which defendants asserted, and plaintiffs either disputed or qualified, rather cryptic and ambiguous statements of purported interests in maintaining the current Board scheme. In that regard, the Court commented at a conference on October 31, 1984:

> [I] must say there is still a certain lack of sharpness about the formulation of the matters that may yet have to be explored as the second phase of this case." Tr. p. 3.

In an attempt to further sharpen the definition of the interests to be evaluated by the Court, the parties stipulated on February 13, 1985, to forego oral testimony and

submit in writing purported justifications for the extant deviations. This, the defendants and *amicus* Marchi have now done.

Evaluating the Purported Justifications

A. Introduction

9. The defendants' and *amicus* Marchi's asserted justifications fall into six categories: (1) historical factors; (2) natural boundaries; (3) the integrity of political subdivisions; (4) the effectiveness of the Board; (5) meaningful participation by the lesser populated boroughs in Board affairs and (6) a check on executive authority.[1] Though

[1] For the Court's convenience, I shall list below the number of the "interest" described in the previously filed "Joint Stipulation," which falls under each of the above six categories.

Category 1—"Interests" 5, 6, 9
Category 2—"Interests" 5
Category 3—"Interests" 4, 6, 7, 9, 14
Category 4—"Interests" 8, 4, 10, 11, 12, 13, 14, 16
Category 5—"Interests" 3, 4, 7, 9, 14, 17, 18
Category 6—"Interests" 15

Because the asserted "interests" in the "Joint Stipulation" are so loosely defined, several seem to fall into more than one category. However, none seems to require any catgory beyond the six described above.

Similarly, defendants' and *amicus* Marchi's most recent affidavit submissions fall into these six categories. But because these are new submissions, plaintiff will respond to them more completely below.

It should be noted that asserted "interests" #1 and #2 in the "Joint Stipulation" are in reality not justifications for deviations from population equality at all, but rather cryptic legal arguments in favor of preserving the present Board. In that regard, interest #1, the asserted "absence of demonstrate injury" under the present scheme of six citywide officials sitting together with the five borough presidents was rejected by this Court in its opinion fixing its methodology for analysis. This Court found cognizable, absent any showing of specific prejudice, mathematical deviations from voting equality notwithstanding the presence of three citywide

(footnote continued on following page)

the defendants and *amicus* Marchi have proferred these interests without organizing them, each of the interests cited in the "Joint Stipulation" and, most recently, in the affidavits in opposition to plaintiffs' summary judgment motion, falls within one or more of these headings.

10. Plaintiffs have already addressed several of the purported justifications in detail in their "Memorandum in Support of Summary Judgment." at pp. 44-52, 70-84. The Court is respectfully referred to these discussions. In their "Memorandum," plaintiffs argue that defendants' claims of representation for boroughs are exaggerated because New York (except for Staten Island) has become a city of neighborhood interests rather than borough interests. This is consistent with the decrease in borough governmental powers after the 1963 Charter revisions. At least one of the defendants in the instant litigation City Council President Carol Bellamy apparently agrees with the plaintiffs on this point. See, Exhibit B. As a result, this defendant has received permission to be dismissed as an individual defendant in this case. See, Stipulation of March 4, 1984. In their "Memorandum," plaintiffs also argue that tangible prejudice in economic allocation flows from the present Board scheme, and that disproportionate benefits inure to Staten Island, at least by comparison to other homogeneous areas of equal population in other boroughs which do not have their own representative on the Board of Estimate. See pp. 50-52, 83-84. Finally, plaintiffs demonstrate that *equality* of borough representation, when population deviations between boroughs are extreme, cannot be justified under well-established precedent, see pp. 70-80, and that the Board's voting practices and rules do not mitigate the voting dilution inherent in such a scheme. See pp. 80-82.

(footnote continued from previous page)

officials who could control the Board with six votes. 492 F. Supp. at 1467-69, 1470-75. Moreover, plaintiffs demonstrate in their "Memorandum in Support of Summary Judgment" that there is evidence of specific prejudice in capital budget allocations and for local representation generally. See plaintiffs' Memorandum pp. 44-52 and A hereto. Finally, the defendants assertion of absence of prejudice ignores the heart of one person, one vote principles; namely, no single voter's power may be diluted absent adequate justification. No further prejudice need be shown.

As to asserted #2, "uniqueness of the Board," this standing for its own sake cannot qualify as a justification for voting dilution. Uniqueness must serve some purpose to rise to the level of a significant or meaningful political interest in a voting scheme. In any event, it is by no means clear that the Board is unique among American cities. As *amicus* Marchi points out, at ¶29 of his affidavit, the composition of the City Council of Virginia Beach, Virginia, "is significantly similar" to the Board scheme. The Supreme Court upheld this scheme in *Dusch* v. *Davis*, 387 U.S. 112 (1967) but only because each member of the council was elected at-large.

11. In that regard it bears repeating that Supreme Court evaluations of purported justifications from voting equality have never tolerated or accepted a deviation greater than 16.4%. See *Mahan* v. *Howell*, 410 U.S. 315, *modified on other grounds*, 411 U.S. 922 (1973) (16.4% upheld) and *Swann* v. *Adams*, 385 U.S. 440 (1967) (26% found unacceptable). Though the Court has regularly evaluated "legitimate considerations incident to the effectuation of rational state policy,"[2] it has required as a

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[2] *Reynolds* v. *Sims*, 377 U.S. 533, 579 (1964); see also *Brown* v. *Thomson*, 462 U.S. 835, 103 S. Ct. 2640, 2695 (1983); *Gaffney* v. *Cummings*, 412 U.S. 735, 742 (1973); *Mahan* v. *Howell*, *supra* at 325; *Abate* v. *Mundt*, 403 U.S. 182, 185 (1971); *Avery* v. *Midland County*, 390 U.S. 474, 484-85 (1968); *Swann* v. *Adams*, *supra* at 444 (1967); *Roman* v. *Sincock*, 377 U.S. 695, 710 (1964); *Davis* v. *Mann*, 377 U.S. 678, 692 (1964); cf. *Chapman* v. *Meier*, 420 U.S. 1, 25 (1975).

prerequisite to such evaluations a showing that the defendants have engaged in an "honest and good faith effort to construct districts . . . as nearly of equal population as is practicable." [3] Moreover, a "state's policy urged in justification of disparity in district population, however rational cannot constitutionally be permitted to emasculate the goal of substantial equality." [4]

12. This Court's recent decision in *Andrews* v. *Koch*, 528 F. Supp. 246 (E.D.N.Y. 1981), *summ. affd.* 688 F.2d 815 (2nd Cir. 1982) perhaps better than any other, directly addresses the concerns at hand. There, two council-at-large seats from each borough introduced a deviation of 50.4% from voting equality. The cause of this deviation was identical to the cause in this case—equal representation by borough even though Staten Island is only one sixth the population of Brooklyn. The asserted justifications for the deviation inherent in the City Council scheme were somewhat more compelling than those proferred in support of the current Board of Estimate scheme. In *Andrews*, justifications consisted not only of the six areas of interests present here, but are asserted by defendants to support representation by "boroughs, a strong traditional base in New York City government," 528 F. Supp. at 249, but in addition, a powerful political justification absent in this case, the City's interest in minority party representation on the City Council which was assured by one of each set of at-large seats being available only to

[3] *Reynolds* v. *Sims, supra* at 577; see also *Brown* v. *Thomson, supra* at 103 S. Ct. 2690, 2695-96; *Gaffney* v. *Cummings, supra* at 748-49; *Mahan* v. *Howell, supra* at 3242.

[4] *Mahan* v. *Howell, supra,* at 326 (16.4% acceptable).

a minority party. Moreover, in *Andrews,* Staten Island had at stake more than half of its City Council representation. It was represented by only one and a half *district* council members but two at-large seats. Thus, in *Andrews,* this Court refused to accept the dual interests of borough representation and minority political party representation, along with the interest of maintaining the lion's share of Staten Island's delegation to the City Council, as adequate justification for a deviation far smaller than that at issue here.

B. *The Evidence Submitted By Defendants And Amicus Marchi*

13. In asserting justifications for the present Board scheme, notwithstanding its 132.9% deviation, the parties defending the *status quo* have taken somewhat different tacks. The City, as defendant, by the affidavit of Susan Rosenberg, has chosen to rely primarily on the arguments it made in its October 26, 1983, memorandum concerning the Board's voting practices and rules. Those matters are discussed in plaintiffs' "Memorandum In Support of Summary Judgment" at pp. 77-82. The City also relies on the "Interests" listed in the parties "Joint Stipulation." [5] Finally, the City relies on two affidavits submitted by the Mayor and Staten Island Borough President Lamberti, both of which will be discussed below in connection with plaintiffs' discussion of each of the affidavits which have been offered.

14. Other than the Mayor and, the borough president from Staten Island none of the original parties to this lawsuit have chosen to defend it by submission of affidavits

[5] See footnote 1 on p. 4.

or other evidence.[6] Thus, four borough presidents and the Comptroller have abstained, except insofar as they passively join the City's overall position in this case.

(1) *The Affidavit of Staten Island Borough President Ralph Lamberti*

15. The primary effort in support of justifying the 132.9% deviation is offered by the parties and *amicus* from Staten Island. The Mayor's affidavit simply pleads for this Court to leave well enough alone, saying that the Board functions effectively. The effective functioning of the Board will be discussed extensively, below. Borough President Lamberti's affidavit, however, first asserts the claim that the other boroughs are not prejudiced by his one vote.[7] To support this point, Lamberti reiterates the City's earlier arguments concerning the voting practices and rules of the Board, emphasizing the presence of the majority of citywide officials. See Lamberti affidavit ¶ 3-5 and see, plaintiffs' "Memorandum" pp. 77-82. In that regard, he contends that the presence of citywide members on the Board, assures fairness to all the boroughs. Lamberti affidavit, ¶ 5. Nonetheless, he illogically concludes

[6] As noted above, City Council President Carol Bellamy has apparently agreed with plaintiffs' position. See supra, at p. 7 and Ex. B.

[7] These are assertions of fact with which plaintiffs do not agree. These claims are unsupportable and if the Court finds them relevant to disposition of this case, the plaintiffs assert their right to a hearing. However, plaintiffs firmly believe that unjustified dilution of individual voting rights is the only criterion which need be demonstrated to warrant the requested relief. Plaintiffs do not understand these claims to be relevant either to a showing of voting rights dilution or the justifications therefore, the only two issues relevant to disposition of this case.

that Staten Island requires an *equal* vote, as opposed to a vote reflective of its population, to assure that it will receive a fair share. Id. at ¶ 5, p. 4.

16. Lamberti then argues that as borough president of Staten Island he is able to represent his homogeneous constituency; that the interests of Staten Island's residents are relatively uniform. Id. at ¶ 6; see also Trautmann affidavit attached as Ex. D to the affidavit of *amicus* Marchi. Plaintiffs, of course, agree on just this point. From the outset, plaintiffs have asserted this as one primary aspect of the actual prejudice to the Board's unconstitutional scheme. Only Staten Island has a representative for its homogeneous interests; whereas, each of the other boroughs has similarly homogeneous areas within their boundaries with populations as large as Staten Island, but none of these areas has a single representative or voting power on the Board. Thus these neighborhoods in the other boroughs are prejudiced in that they cannot get the attention and protection which Staten Island has secured. See Plaintiffs' Memorandum, passim.

17. Next, Lamberti reverts to the argument that the presence of the citywide officials assures fair representation. He characterizes the Board as a "collegial body" in which the various representatives work together on local and citywide issues. He cites examples of the involvement of citywide officials in issues that he characterizes as "local." Id. at ¶ 7. Plaintiffs again agree that the Board is a "collegial body" in which all members address both local and citywide matters. Of course, "borough courtesy" is an unwritten rule commanding deference to the borough president of the borough where any specific issue is cited.

See Plaintiffs' Appendix in support of motion for summary judgment, Sayre and Kaufman, *Governing New York City* (1960) pp. 643; New York State Charter Revision Commission for New York City, *Borough Government Report* (1973) pp. 41-47. However, given just this "collegial" nature of the body, it seems plain that *equal* voting power for each borough is not a prerequisite to optimal functioning. In fact, nothing Lamberti cites supports the requirement of equal voting power for each borough. And, the history of the Board as a "collegial body" demonstrates that equal votes are not necessary for its effective operation.

18. From 1901 until 1958, a period during which the Board was far more powerful than it is today, Staten Island had one vote to the two held by Manhattan and Brooklyn. Although the votes were not weighted to satisfy modern one person, one vote requirements, this voting structure recognized the vast population differentials between the boroughs. As Lamberti admits and the Maniscalco Affidavit demonstrates, the plain fact is that the rule of "borough courtesy" and the "collegial" operations of the Board protected the lesser represented boroughs from the feared rapaciousness of the larger. See Ex. B, ¶ 19, attached to affidavit of *amicus* Marchi, discussed below. Similarly, weighted voting achieves the same result. Just as we know that small towns among larger which comprise the many county boards of supervisors in New York State are protected by deference to their representatives who have small weighted votes, we can be assured that the smaller boroughs will be protected notwithstanding their lesser voting power. See *League of Women Voters* v. *Nassau County Board of Supervisors,* 737 F. 2d 1477

(2d Cir. 1984); *Greenwald* v. *Board of Supervisors,* 567 F. Supp. 200, aff'd. 742 F. 2d 1434 (1983). In fact, the smaller boroughs will derive even greater protection than small towns represented on county boards simply because the citywide at-large members (who have no counterparts on the county boards) will protect the interests of the smaller boroughs in the collegial process. Thus, there is no basis to support the Lamberti claims, ¶ 8-9, that Staten Island's natural resources will be ravaged and that the City will dump undesirable projects in that borough merely because *equal* voting power is altered for that borough. If that were to be the case, the present Board scheme allowing Staten Island only one vote, would lend itself to those needs. Such fears are exaggerated and, in any event, do not detract from a system of votes reflective of population deviations, as long as such a voting system provides Staten Island with a meaningful vote. See Exs. D and E and discussion below. Thus, Lamberti's argument that the Board with its majority of citywide members is a "collegial body" which protects Staten Island notwithstanding its single vote and the lure of its land and resources, contradicts his argument that a vote equal to the other boroughs is a prerequisite to securing the interests of Staten Island.[8]

[8] The flip-side of this argument is that since Staten Island is part of the City, it does not deserve any more protection than any other area populated by 350,000 people. Like any other such area its representation on the Board should serve to protect its assets and fend off city-imposed liabilities. But to preserve Staten Island's unfair advantage in this process, which its representatives essentially concede that it now has, and which they are fighting to preserve, is to violate the very essence of one person, one vote protections.

(2) *The Affidavit of Assemblyman Robert Straniere*

19. Intervenor Robert Straniere offers the only new argument in support of justification of the 132.9% deviation inherent in the Board's current structure. He argues that in creating New York City out of five counties, the State Legislature intended to perpetuate the county structure even within the City of New York. Affidavit of Straniere ¶ 6-12. Moreover, he argues from the time the Board structure was approved in 1901, the State Legislature sought to guarantee direct borough representation on the Board. Id. at ¶ 7. And, that up until the present time the State Legislature has exhibited a continuing state policy in maintaining the five borough system notwithstanding the overall recognition of the City. Intervenor Straniere then argues that such state policy is akin to that accepted by the Supreme Court in *Brown* v. *Thomson, supra,* where continued separate representation of the one Wyoming county which was challenged, was held to justify the minimal dilutive effect on the voters of the remainder of the state, given the importance of the county system of government in that state. Id. at ¶ 8-20.

20. Plaintiffs are not required to contest this analysis because compliance with one person, one vote requirements in this case does not preclude full recognition of Staten Island as a county of the State and City.[9] Notably, Staten

[9] It must be noted, as *amicus* Marchi's affidavit clarifies, that the Legislature has generally treated the five counties which comprise New York City very differently from other counties in the state. Generally, all local powers are vested in the City, where elsewhere, such powers vest in county governments. See, affidavit of *amicus* Marchi, ¶22-23; Municipal Home Rule Law, Constitutional Provisions §§ 1(a), (b)(1), 2(b)(2), 3(d)(1); Article I, Sec. 2(5)(12); Art. III, Sec. 31; Art. 5, Sec. 40; Art. 6, Sec. 50(2).

Island was recognized as a county of both the State and City for the 58 years (from 1901-58) when it had only one vote to the two each, which Manhattan and Brooklyn held. Staten Island has, and is guaranteed, the full representation which its population warrants in the State Legislature. But, its representatives here argue for far more than the full representation which its population warrants in the City's Board of Estimate. Respect by the State for Staten Island's status as a county cannot justify disproportionate representation in City matters. The State must abide by the constitutional dictate that counties are entitled to representation in the Legislature which is proportionate to the population of each county. *Flateau* v. *Anderson,* 537 F. Supp. 257 (S.D.N.Y.), *cert. denied,* 458 U.S. 1123 (1982). The State, therefore, cannot guarantee that counties retain disproportionate representation in local municipal bodies which are also under the constraint of constitutional protection.[10] *Avery* v. *Midland County,* 390 U.S. 474 (1968).

21. Moreover, this case is unlike *Brown* v. *Thomson, supra,* in a fundamental respect. In *Brown,* the plaintiffs sought to deny representation to a single county because of its size. Here plaintiffs do not seek to deny Staten Island direct and separate representation as a county not-

[10] The essence of Straniere's argument is undercut by Municipal Home Rule legislation passed in 1969 in the wake of many reapportionment controversies. The text of Article 2 §10(a)(b)(c)(h) as amended is quoted in Ex. C as is the state policy underlying this legislation. This legislation and policy specifically sets forth the State's command that local municipal governing institutions strictly comply with one person, one vote. The statute and its legislative history demonstrate the State's commitment to weighted voting schemes as one method of satisfying one person, one vote requirements. See Ex. C.

withstanding its size. No conceivable remedy to the Board's current constitutional difficulty would deny Staten Island direct and separate representation as a county. Moreover, the interest at stake in *Thomson* was far more compelling than that at stake here. The counties in Wyoming, as discussed in *Brown,* were the full-fledged basic unit of local government; whereas, in New York State counties are the basic unit of local government *except* in New York City where City government under state authority has taken over all but a few remaining vestiges (e.g. county district attorney, county clerk) of traditional county government. (e.g. adoption of local laws, franchises, land use, taxation, fire, police and sanitation). See plaintiffs' Memorandum at pp. 67, 68, 72-3, 75; see fn. 9, above.

2. Finally, as this Court points out in its August 21, 1984, decision, there exist many potential schemes which guarantee effective representation of lesser populated geographic areas within a governing body, consistent with one person, one vote:

> Ascertaining at this time whether significant input by the smaller boroughs is a valid concern fostered by the Board may be especially important if the Board is eventually reapportioned, since certain electoral models "assure that sparsely populated areas . . . have a voice in the councils of government." *Greenwald* v. *Board of Supervisors of the County of Sullivan,* 567 F. Supp. 200, 203 (S.D.N.Y.) (upholding the constitutionality of an adjusted weighted voting plan) (footnote omitted). *See also Baker* v. *Regional High School District No. 5,* 476 F. Supp. 319, 321, 323 (D. Conn. 1979) (In tentatively approving an "ingenious" condition for a three-town board of education preventing

> majority votes from being carried by the largest town alone or by the two smallest towns together, the court described the total plan as an apparently "conscientious effort to comply with constitutional requirements while providing sufficient checks on majority action. . . ."). *See generally Sailors* v. *Board of Education,* 387 U.S. 105, 110-11, 87 S. Ct. 1549, 1553, 18 L. Ed. 2d 650 (1967) ("Viable local governments may need many innovations numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation.") 492 F. Supp. at 1477.

In that regard, many counties in New York State are governed by a county board of supervisors. *League of Women Voters* v. *Nassau County Board of Supervisors, supra* at fn. 10; *Greenwald* v. *Board of Supervisors, supra, Ianucci* v. *Board of Supervisors,* 20 N.Y. 2d 244, 282 N.Y.S. 2d 502 (1967). Weighted voting under a Banzhaf mathematical model is employed to assure meaningful participation and representation for even the smallest participant. Full recognition of local municipal units is possible under this system while at the same time providing votes to representatives in weights that correlate both with the population they represent and fair voting power (as defined by the opportunity to cast the deciding vote—the "critical vote"—discussed further below). Such a system conforms with one person, one vote requirements under *Ianucci, Greenwald,* and *League of Women Voters* and clearly provides one method of assuring that Staten Island continues to be directly represented as a county unit of government and does not become a "by-stander" on the

Board. See affidavit of Professor Lee Papanayopolous attached as Ex. D. Such a system guarantees that Staten Island as a county will have its fair share of influence in situations when critical votes are cast. (See more complete discussion hereafter at p. 39-43) And, such a system is readily available, as described in Ex. E by Professor Steven Brams, whose expertise this Court has previously recognized. 592 F. Supp. at 1474.

23. Straniere's remaining arguments focus on the effectiveness of the present board, its ability to assure meaningful participation by the lesser populated counties and its role as a check on executive authority. Id. at ¶21-52. As to the issue of effectiveness, the central flaw in Straniere's argument is plainly identifiable from the first sentence of ¶28 of his affidavit:

> Effective representation, in light of *Reynolds,* amounts to the ability of representative to advance the interests of his or her constituency on a substantially equal basis with the other representatives elected to a legislative body that makes governmental decisions affecting their respective constituencies.

This is simply not the case where elected officials represent districts of vastly different populations. *Reynolds* does not guarantee equal protection to legislators or counties, but to people. The essence of *Reynolds* is that legislators represent people, not geography, and that people are entitled to a fair share of the vote, not legislators:

> To the extent that a citizen's right to vote is debased, he is that much less a citizen. The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote.

> The complexions of societies and civilizations change, often with amazing rapidity. A nation once primarily rural in character becomes predominantly urban. Representation schemes once fair and equitable become archaic and outdated. But the basic principle of representative government remains, and must remain, unchanged—the weight of a citizen's vote cannot be made to depend on where he lives. Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies. A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm. This is the clear and strong command of our Constitution's Equal Protection Clause. This is an essential part of the concept of a government of laws and not men. This is at the heart of Lincoln's vision of "government of the people, by the people, [and] for the people." (footnotes omitted) *Reynolds* v. *Sims,* 377 U.S. 533, 567-8 (1964).[11]

This principle in no way detracts from the necessity and opportunity of the Board to function effectively. None of the valid points made by Straniere or any other defendant or *amicus* Marchi require that the various county representatives have *equal* votes. The history of the Board prior to 1958 shows that equal votes among the county representatives is not a prerequisite to efficient functioning. If anything, the Board was more effective in the years prior to 1958, when it was even more powerful than it is now. During the pre-1958 period the Board functioned as a long-range planner and a repository of the City's

[11] Straniere also fails to recognize that this same principle is plainly the policy of the New York State Legislature of which he is a member. See Ex. C.

primary day-to-day power. Moreover, Straniere himself points out, ¶28 (along with defendant Lamberti and former borough president Maniscalco) that the Board is a "collegial body" permitting each representative, "[g]iven the relatively small size of the eight-member Board, the ability . . . to put forth the interests of his own county . . ." In that regard, no defendant nor *amicus* Marchi has offered any evidence that demonstrates that the effectiveness of the Board's functioning, which benefits each county and the City as a whole, is dependent on equal votes for the borough presidents or will be diminished if the Board operates under a system of weighted votes which reflects a fair share of voting power by population for each county. See Ex. D and E. There is no evidence that a Board reflective of population would be unable to serve the needs of the City and its counties.

24. Similarly, the effectiveness of the Board insofar as Straniere argues that it enables the counties and the City to balance their interests and needs, ¶11-16, will also not be diminished by votes weighted in accordance with voting power as determined by population. As long as borough presidents continue to represent the county as a unit, the various interests within the counties will struggle for the borough presidents' voice, as they do now,[12] and the various

[12] Plaintiffs have argued that borough president representation denies equal representation to homogeneous groups of the same size as Staten Island in the other counties. See plaintiffs' Memorandum at pp. 44-52, 83-84. If borough president votes are weighted by power, in accordance with population, see Ex. D and E, then at least the one homogeneous group—Staten Island —will not have more power than others, even though that group will have direct representation. It is clear, and plaintiffs concede, that the "justifications" and "interests" which are cited by

(footnote continued on following page)

county and City interests will struggle for the Board vote, as they do now. The only difference in a system reflective of population disparities will be that instead of the borough president of Staten Island having disproportionate power in critical vote situations, he or she, along with the representatives of the other boroughs will have power in critical vote situations commensurate with the population they represent. See Exs. D and E. As the Second Circuit recently decided in *League of Women Voters Nassau County Board of Supervisors, supra,* such a scheme and the various appropriate weights it entails are fully reflective of constitutional requirements. See Ex. D. Similarly, any one of a number of oher "ingenious" municipal experiments in government structure might well also satisfy all of these interests. See Ex. E and ¶17, above. Thus, Straniere's argument with respect to "meaningful participation of the lesser populated counties" is in some sense collapsed into his arguments relating to the "effectiveness" of the Board.[13]

(footnote continued from previous page)

defendants and *amicus* Marchi warrant perpetuation of direct representation for Staten Island. Plaintiffs have no quarrel with this point. Plaintiffs *do* quarrel with the defendants' claim to disproportionate power for this direct representation. Thus, whatever option is chosen to cure this ill, whether it be weighted votes, expanded representation for other boroughs or one of the other "ingenious" methods mentioned in this Court's last opinion, 492 F. Supp. 1477, see also, Ex. E, direct representation for Staten Island and every other borough need not be sacrificed. Therefore, the effectiveness of the Board and its ability to coordinate local and citywide interests need not be compromised.

[13] At ¶35, Straniere incorrectly characterizes plaintiffs as having agreed that "the allocation of an equal voice to each of the five county representatives advances the policy of insuring that 'different parts of the City get their fair share of service contracts and capital budget allocations.'" "Joint Stipulation" ¶13. Plain-

(footnote continued on following page)

Since one of the Board's primary functions is to assure "meaningful participation" it cannot be effective without accomplishing this function.

25. Straniere further argues that Staten Island requires a vote on the Board equal to the other larger counties because of the Board's land-use planning functions. ¶33-40. He says these are local responsibilities and should be controlled locally. This argument, however, evades the plain scope of the Board's power. Staten Island does not have power over local land-use and the one vote out of eleven that it maintains on the Board is not the source of its control over its land-use planning. Whatever influence it has, derives from "borough courtesy" and the deference within the Board to the boroughs as a "collegial body." These aspects of Staten Island's power and influence remain intact under any one of a number of alternative Board schemes that is designed to protect this right. See Ex. E and 592 F. Supp. 1477. Violation of one person, one vote is not required to perpetuate Staten Island's current control over its land-use planning.

26. Moreover, were such control exercised by Staten Island as a result of its Board vote (and plaintiffs repeat —it is not) such control would be inappropriate. Though Staten Island remains a county it is, first and foremost,

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tiffs did not agree, stating unequivocally that "under the present Board structure the smaller boroughs obtain more than their allotted share by population, and that a Board reconstituted to comply with one person, one vote strictures could far better serve this function as it would more accurately reflect all the people's interests."

a borough of New York City.[14] As such, its land-use planning is to be exercised for the benefit, not only of Staten Islanders, but also for the citizens of the entire City. That was the essence of consolidation in 1898 as it is today. Thus, since such decisions should be made in the best interests of the City, it is unfair and improper for the citizens of Staten Island to exercise disproportionate power to better themselves, when the citizens of Brooklyn are less able to exercise equivalent power.

27. It is exactly for the above reasons that Straniere's arguments concerning a "tyranny of pure numbers," ¶36-44, make no sense. Were "a tyranny of pure numbers" the method of the present Board, Staten Island could and would always be outvoted. But because the politics of the Board affords restraint, courtesy and deference, depending on the specific issue, this does not occur. What does occur is that Staten Island with an equal vote has a mathematically quantifiable share of power with respect to its population in all *critical* votes of the Board. See Ex. D and E. It is in these critical votes where the politics of deference and restraint break down. These are the cases where voting power becomes important; all parties are unwilling to agree or defer. Thus, these are the cases where the minority prejudices the majority, because on a Board with equal votes for each borough president, the minority has far more than its fair share of critical votes. The "tyranny of pure numbers" which Straniere describes is in reality reversed. Instead of a tyranny dominated by the majority, the minority with undue control of critical votes determines an unfair proportion of the hotly dis-

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[14] See fn. 9, above, describing a plethora of state authority in support of this point.

puted issues. In this sense the minority's influence is genuinely disproportionate. Since Staten Island with an equal vote has 20% of the borough presidents' voting power, but only 5.3% of the population, it is overrepresented in this sense by 285% and Brooklyn is underrepresented by 37%. See Ex. E. This is the "tyranny" which must be brought back into focus. Only by expanding either voting weight or representation for the more populous boroughs can this imbalance in critical vote situations be cured. See Ex. D. Straniere's arguments in this section of his affidavit, are purely and simply anti-majoritarian and unfair. They are a fundamental rejection of the plain meaning of one person, one vote. Straniere Affidavit, e.g. ¶41, (decrying "a tyranny of pure numbers [in which] the smallest district would always have one-twentieth of a share of the voting power although it contains one-fifth of the total geographic area. . . . ".)

28. Next, Straniere argues that the Board as presently constituted serves as a check on the Mayor's executive authority and supplements the City Council's authority. Straniere Affidavit ¶45-48. This is no doubt true; however, as long as the Board maintains its present functions and powers, the relationship with these two coordinate institutions of City government will not be altered. In other words, Straniere does not argue that an equal vote for each borough is necessary to serve as a check on executive authority. Nothing about a Board which complied with one person, one vote requirements would undermine this interest as long as each borough maintained direct representation.

28. Finally, Straniere argues that there are no acceptable alternatives to the present Board scheme. Id. at

¶49-52. He rejects both a weighted voting scheme and expansion of representation for the larger boroughs. He fails, however, to consider those alternatives suggested by this Court, as quoted above in ¶19, herein. He also fails to consider alternatives such as those suggested by Professor Brams in Ex. E. Moreover, he fails to consider a weighted voting scheme which is based upon critical votes under a Banzhaf analysis. See *League of Women Voters* v. *Nassau County Board of Supervisors, supra; Greenwald* v. *Board of Supervisors, supra; Ianucci* v. *Board of Supervisors, supra.* See also, Ex. D and E. Such a system would preserve a Board identical to the present scheme which Straniere seeks to save; yet, it would apportion votes to borough presidents in accordance with the proportion of critical votes each is entitled to, based on the borough's population. In this manner, each and every interest and justification which Straniere has identified can be respected without allowing any minority district undue influence over critical votes that the Board inevitably must face. Clearly, such a scheme fairly respects the interests of each borough and the City as a whole. Moreover, under *League of Women Voters, Greenwald,* and *Ianucci* a weighted voting scheme satisfies one person, one vote requirements.

(3) *State Senator John Marchi's Affidavit And Exhibits.*

30. The first portion of the Marchi affidavit traces the history of consolidation of the City prior to 1898. Marchi relies on the affidavit of Loring McMillen who is official borough historian for Staten Island. In essence their argument arising out of the period leading up to consolidation in 1898 is that Staten Island would never have chosen to

consolidate unless its citizens believed that they would be assured "meaningful representation" in the governance of New York City.[15] Of course, plaintiffs do not disagree. It is plaintiffs' position, in this regard, that even when Staten Island had one-half of the vote of Manhattan and Brooklyn, until 1958, it had more than its share of "meaningful representation" on the Board. Plaintiffs' position in this regard is simply that Staten Island has been consistently overrepresented and that only if its voting power in the Board's critical votes is correlated to its relative population will it be properly and "meaningfully represented." See, Ex. D and E. Moreover, plaintiffs do not suggest that sacrificing direct representation by the borough president of each county is necessary to achieve one person, one vote compliance. Just the opposite, Staten Island and every other county should maintain "direct representation on the Board." See ¶13, Marchi affidavit.

31. Next, Marchi argues, as does Straniere, that the State has played the primary role in reforming the gov-

[15] Mr. McMillen admits that the records nowhere reflect any discussions of assurances of "meaningful representation." McMillen affidavit ¶18. Moreover, it is clear that Staten Islanders more wanted to consolidate with New York than any other borough, at least, insofar as the referendum is reflected of that desire. Id. at ¶13. Finally, it is undisputed that the borough presidents were never considered for Board membership until 1901 when Brooklynites succeeded in amending the Charter to assure borough president presence on the Board. See *Kramarsky Report*, p. 4. To the extent that the history of the Board is relevant at this early period, its primary importance is the fact that Staten Island gave up its local authority to the centralized city government which, thereafter, became the primary municipal force throughout the five counties comprising the City. As the centralized power of the City grew with each major Charter revision, the separate and historic functions associated with Staten Island, or any other county, diminished. See plaintiffs' Memorandum at pp. 9-21.

ernment of New York City.[16] Id. at ¶14-17. Again, this is not at cross-purposes with plaintiffs' position. When the state altered the Board's voting structure in 1958 it did so prior to the application of one person, one vote principles. Whatever political compromises, policies and interests caused the change of the Board's voting structure, the Legislature could not possibly have accounted for constitutional principles applied to municipalities ten years later. *Avery* v. *Midland County,* 390 U.S. 474 (1968).

32. In any event, it is notable and significant here that former borough president Albert Maniscalco, in his affidavit in support of the Marchi affidavit, states unequivocally that even before the 1958 voting change, when he had one-half the vote of two other borough presidents, "my opinion and expertise on matters relating to my borough was, I believe, given the same credence and weight by other Board members in their deliberations whether I cast one or two votes. . . . , Since I was a meaningful participant able to influence the outcome of a vote." See Maniscalco affidavit ¶19. Thus, as long as his vote was viewed as potentially critical, the borough president played a significant role in Board deliberations. It is just this sort of evidence which plaintiffs believe demonstrates the absence of valid "interest" and "justifications" adequate to support the current Board scheme. On the other hand, a scheme with votes weighted by population share of critical votes would fit exactly within the Maniscalco analysis. See, Exs. D and E.

[16] Undoubtedly, one reason that Charter revision has been achieved on several occasions by the State Legislature is because it is simply easier to pass such legislation with the support of the City's legislators, than it is to hold a local referendum.

33. The Marchi affidavit, ¶19 cites numerous statutory examples of the Legislature's use of the boroughs to distribute appointments. These arguments were previously addressed in plaintiffs' Memorandum at p. 76, fn. 102. Special note should be taken of *Oliver* v. *Board of Education,* 306 F. Supp. 1286 (S.D.N.Y. 1969) in which the election of the Board of Education of the City of New York was struck-down because members were elected by borough and, thus, in violation of one person, one vote. The affidavit of James Regan speaks to the functioning of the current Board of Education which is appointive by borough. The affidavit asserts that the system works well as presently constituted. Again, plaintiffs need not dispute Mr. Regan's conclusions to support their arguments concerning the Board of Estimate.

34. The thrust of the next section of the Marchi affidavit, ¶21-25, is to further argue the policy of the State to guarantee rights to local government. But as the affidavit plainly sets forth, the rights of local governments apply to counties " 'except those wholly included within a city.' " Id. at ¶23. This plain policy statement clarifies, that notwithstanding the Straniere and Marchi arguments to the contrary, the policy of the State Legislature has been uniformly to render the rights of the five New York counties wholly subservient to those of the City as the predominant local entity.[17] It is thus fair to say that the State Legislature has not intended to assure Staten Island one vote on the Board in violation of one person, one vote. Specific

[17] See fn. 9, supra.

legislative policy is contrary to such a claim.[18] See fn. 10 and Ex. C. above.

35. Finally, the Marchi affidavit argues that the Board "is needed" and "it works." Id. at ¶26-33. Again, plaintiffs do not disagree. The Board serves its function well, even if not as democratically as plaintiffs and some critics would like.[19] By the same token, nothing in the Marchi affidavit or its exhibits demonstrates that the Board could not just as well serve its purposes, employing a scheme consistent with one person, one vote. As the Marchi affidavit itself points out, an analogous system was upheld by the Supreme Court in *Dusch* v. *David,* 387 U.S. 112 (1967). There, as this Court is aware, a unique form of municipal government satisfied one person, one vote strictures by employing an ingenious approach to voting and residency requirements. Regrettably, the current Board of Estimate scheme is entirely unadaptable to population shifts and, thus, entirely outside one person, one vote re-

[18] In 1975, at the time of the most recent Charter revision of Board powers, the Legislature must be presumed to have followed the Court of Appeals decision from 1969 in *Bergerman* v. *Lindsay,* 25 N.Y. 2d 405, 306 N.Y.S. 2d 898 (1969) *cert. den.,* 398 U.S. 955 (1970) upholding the Board as not subject to one person, one vote. Thus, arguments concerning the Legislature's failure to reform the Board in 1975 are not on point.

[19] There have been several recent criticisms of the Board's undemocratic practices and procedures, which contradict the affidavits of the Mayor and Senator Marchi, claiming that the Board's functioning is uncontroversial. Most criticism has focused on the undemocratic nature of the Board's executive sessions which result in final decisions well before public hearings. The critics complain that such hearings are a sham. See Ex. B and F and *Kramarsky Report* pp. 20-26, 112; see also, Transcripts of the New York City Charter Revision Commission Public Hearings, Bronx County Courthouse pp. 87, 90. (Feb. 3, 1983).

quirements. Like affiants Maniscalo and Marchi, plaintiffs do not wish to eliminate "meaningful representation" for Staten Island. Plaintiffs merely wish to conform such representation to population requirements within a City that has many other citizens whose individual voting rights are at stake. In that regard, this Court and defendants plainly understand that plaintiffs do not seek relief *against* Staten Islanders, but rather *on behalf of* a large majority of the remaining citizens of New York.

C. *Categorizing the Purported "Interests" In Support of the Current Board Scheme.*

36. As is indicated by the above response to defendants' and *amicus'* Marchi's presentation, no attempt to place the purported "interests" into categories of justifications has been made by the defendants or *amicus* Marchi. In this Court's August 21, 1984, opinion, the Court began this process. 592 F. Supp. at 1475-77. Below, plaintiffs will attempt to complete it for the "interests" which have been proferred to date. As alluded to above in ¶ 7 above, plaintiffs believe that all of the identified interests fall into six categories: (1) historical factors; (2) natural boundaries; (3) integrity of political subdivisions; (4) the effectiveness of the Board; (5) meaningful participation by the lesser populated boroughs in Board affairs; and, (6) a check on executive authority.

38. The heart of plaintiffs' response to each and all of these purported justifications is that a Board with an *equal* vote for the representative from each borough is unnecessary to satisfy the interests that fall into these categories. Therefore, the purported justifications for inordinately

large deviations from voting equality fail because the interests that support these justifications may be satisfied by a Board scheme that comports with one person, one vote dictates. Since none of the concededly valid interests requires the voting dilution which results from equal representation for vastly different sized boroughs, no justification exists for deviating from one person, one vote strictures. A review of the asserted interest by category of purported justification clarifies this point.

(1) *Historical Factors.*

38. The history of the Board is not complicated. When New York was consolidated in 1898, Staten Island joined the other counties before borough representation existed on the Board of Estimate. In 1901, when Brooklyn politicians forced the amendment of the City Charter, the borough presidents joined the Board. From 1901 until 1958, Staten Island, Queens, and the Bronx had one vote each, to Manhattan and Brooklyn's two each. In 1958 each of the boroughs was given an equal vote without consideration of population differentials. This voting distribution has remained unchanged. During the entire period of the Board's existence it has gained in power as compared to the dwindling functions of the borough governments. Board membership has evolved into the primary power of the borough president. This evolution is a reflection of the concentration of power in the City government which has become the source of virtually all local governing power. Thus, the history of the City and the Board does not support any argument for the necessity of an *equal* vote for each borough representative on the Board. Rather, the City's history supports the conclusion that the

Board plays a singularly influential role in exercising the enormous centralized power of the City. It is this centralized power which plaintiffs contend should be exercised in accordance with decisions made by a body which proportionately reflects the relative populations of each borough. As will be described below, such a reform does not preclude direct and meaningful representation for each of the lesser populated boroughs.

(2) *Natural Boundaries.*

39. Plaintiffs concede a continuing interest in maintaining the natural boundaries of the five boroughs, notwithstanding the plaintiffs' lack of knowledge as to how the Brooklyn-Queens boundary was determined. Clearly, Staten Island's boundaries deserve respect in any districting scheme. It is notable, however, that neither federal, state legislative nor city council districts are entirely coextensive with Staten Island or the other boroughs. This is entirely as a result of one person, one vote requirements which demand population concessions across these natural boundaries. In the case of the Board of Estimate, however, it would be desirable, if the districts which comprise the Board respect traditional county lines. Multiple alternative representational schemes that comport with one person, one vote dictates are readily available to satisfy the interest of respect for natural boundaries. Thus natural boundaries do not constitute an interest which amounts to a justification for deviating substantially from one person, one vote parity.

(3) *The Integrity of Political Subdivisions.*

40. This interest is clearly cognizable, but like that of natural boundaries, it is not in conflict with a Board scheme that conforms to one person, one vote requirements. Each of the five vestigial county government constitutes a political subdivision of the City of New York which deserves to have its integrity respected. The Board's representational scheme need not impinge upon either the functions or the jurisdiction of the county governments. As long as the chief executives of the county governments are representatives on the Board, there will be no necessity to compromise the integrity of these subdivisions. Representation by the borough presidents is adequate to serve this interest. It is not necessary that each borough representative have an equal vote. This point is best illustrated by the schemes that New York counties employ to constitute county boards of supervisors. As this Court is well aware from the Second Circuit's (by Judge Neaher) recent decision in *League of Women Voters* v. *Nassau County Board of Supervisors, supra,* towns which comprise the political subdivisions of these boards maintain their integrity by assuring town representation through town supervisor-representatives whose weighted vote is set in proportion to the voting power which the population of each town should fairly command. This method of respecting the integrity of political subdivisions within a body comprised of the executives of those subdivisions—akin to the Board of Estimate—has been constitutionally sanctioned on the basis of Banzhaf weighted votes since the New York Court of Appeals approved such schemes in *Ianucci* v. *Board of Supervisors, supra,* in 1969. See Ex. D. and *Greenwald* v. *Board of Supervisors, supra.* No county board has suc-

cessfully argued that each town member should have an equal vote notwithstanding large population deviations. And, it is uniformly agreed that each town maintains its integrity as a subdivision within such weighted voting schemes. Consequently, it is anomalous for defendants and *amicus* Marchi to argue for an equal vote despite population deviations. At the very least, defendants and *amicus* Marchi must provide a meaningful distinction between the Board scheme and that of boards of supervisors employing weighted votes. See Ex. D.

(4) *The Effectiveness of the Board.*

41. The Board is concededly effective with its present scheme, even though it is regularly and consistently criticized as undemocratic. See, Ex. B, E and F. However, nothing about alternative schemes, such as one with voting power weighted in proportion to population, would diminish the Board's effectiveness. As long as the Board remains small and collegial, and as long as each borough has direct representation on the Board by its borough president, the Board will remain effective. Equal votes among the borough presidents is not a prerequisite for effectiveness. This can be convincingly demonstrated by reference to the towns which participate in the many boards of supervisors around the state. For example, in the Second Circuit's opinion in *League of Women Voters* v. *County Board of Supervisors, supra,* a system of voting power in which Hempstead has 58 votes and Glen Cove, six was upheld. Presumably, the Board of Supervisors worked effectively, just as the Board of Estimate would if its votes were properly weighted. See Exs. D and E. Under such a system, Staten Island would have a considerably greater percentage of votes compared to Brooklyn, than Glen Cove has, compared to Hempstead in Nassau County. 737 F. 2d at 59. See Ex. E. (SI-3 votes, Brooklyn-16) Thus, the interest in eeffectiveness of the Board does not present a cognizable justification for maintaining voting equality among the boroughs.

(5) *Meaningful Participation by the Lesser Boroughs in Board Affairs.*

42. This asserted interest is the essence of the defendants' and *amicus'* Marchi's arguments. They argue that the State has guaranteed an equal vote for Staten Island in the Board to protect its autonomy as a county, notwithstanding its incorporation into the City of New York. The factual premise for this argument is highly speculative, as is demonstrated above. See ¶¶ 17, 28-32, above. Moreover, the State has specifically excepted the five New York counties whenever powers have been reserved to county governments. See fn. 9 and Ex. C. Moreover, state law amendments to the City charter which have affected Board powers have always been initiated by Charter Revision Commissions at the initiative of City government. State law merely represents a more efficient method for change than popular referendum. And, from 1901 onwards, the State has recognized the City as the source of all local authority in the five county area with respect to each of the primary functions of local government—police, fire, sanitation, local laws, taxes, land-use and all other significant local powers.

43. But even if one assumes that the State intended to preserve the equal vote of Staten Island for the Board, in so far as the Board serves all of the people of New York

City and exercises "general governmental powers over the entire geographic area served," *Avery* v. *Midland County*, 390 U.S. 474, 482 (1968), the State and the Board are constitutionally prohibited from ignoring population deviations unless adequate justifications exist. See Ex. C. Thus, to cite purported state policy in this regard is to beg the question. Notwithstanding any such questionable state policy, adequate justifications must exist to overcome more than minor population deviation. Since it is clear that meaningful representation for the lesser populated boroughs can be achieved without equal votes for each borough, see below, the interest in meaningful representation does not serve as a justification for maintaining the current Board structure.

44. Meaningful representation for the lesser populated boroughs is achieved when their borough presidents have influence and power over Board decisions. Any member who is purely a by-stander will not serve the interest of guaranteeing meaningful representation. To that end plaintiffs have presented the Court with a Board scheme which maintains all of the critical aspects of the current Board in order to serve all of the valid interests that defendants and *amicus* Marchi have identified. The only change in the scheme set forth in Exhibit E is that, instead of equal votes for each borough president, the weight of each vote for the borough presidents is determined by the relative power over Board decisions which the proportion of population in each borough should command under one person, one vote analysis. The relative power is defined by the potential for control over critical votes on the Board.

45. As the Court is aware, most Board issues are decided by unanimous agreement long in advance of final *pro forma* voting. Such decisions are not influenced by the weighted voting scheme described by Ex. E. These are the non-critical votes which are governed by the collegiality and deference inherent in Board procedures. See Ex. D. Critical votes only come into play when collegiality and deference break-down over issues about which no agreement can be reached. A recent example is the controversy over siting the first incineration plant in Brooklyn. See Ex. A. A decision based upon a vote that is 6 to 5, where four borough presidents join one citywide official to constitute a majority, provides one example of a case where each borough president in the majority has a "critical vote." Under the present scheme of equal votes allotted to each borough president, there are 48 voting situations in which critical votes are available to each borough president. Thus, Staten Island and Brooklyn have equivalent influence over Board decisions where a close vote determines the outcome of an issue as opposed to deference, political trading, collegiality or agreement. In these critical voting situations—when "push comes to shove" in government—Staten Island is overrepresented by 285% and Brooklyn is underrepresented by 37% when the number of critical votes controlled by each borough is compared to the relative population of the boroughs. See Ex. E. Thus, Staten Island has far more "meaningful representation" than its population warrants in the very situations where meaningful representation truly counts—critical votes.

46. In order to assure the fair degree of meaningful representation to each borough, the share of control over

critical votes must be adjusted to reflect the proportion of each borough's population. If one begins by retaining the relative power over critical votes between the citywide representatives and the borough representatives—6 to 5—one can assign voting weights appropriate to population. First, in order to avoid fractional voting weights, provide the citywide representatives with 60 votes, and the borough representatives with 50 votes. (Merely multiply each category by 10). Then assign 20 votes each to the three citywide officials. With the remaining 50 votes, a computer search is conducted of the many thousands of possible voting variations and the best results are to assign 16 votes to Brooklyn; 12, to Queens; 11, to Manhattan; 8, to the Bronx; and 3 votes to Staten Island. This distribution of votes results in a total maximum deviation of 7.8%. See Ex. E. For Board actions where the Mayor does not vote, a similar scheme based on sharing critical votes in proportion to population is achievable. See Exhibit E.

47. By alloting votes in this way, control by each borough over critical votes varies in direct proportion to population and relative voting weights reflect population. By guaranteeing a fair share of control in the critical votes, overall meaningful representation is assured for each borough. No borough is a bystander; each has its fair share of critical votes. The knowledge that even the smallest borough—Staten Island—may well make a difference in a several tight voting situations will give that borough meaningful representation in the everyday operations of the Board, when collegiality, deference, and agreement usually determine Board decisions. This conclusion is supported by the Maniscalco affidavit presented in support of *amicus* Marchi's arguments. The former borough

president describes the political reality of representing Staten Island before 1958 when he had only one vote as compared to the two each assigned to each Manhattan and Brooklyn. He recalls:

> "With one vote, I and the Borough Presidents of Queens and Bronx could still individually influence the outcome of a close vote. Furthermore, my opinion and expertise on matters relating to my borough was, I believe, given the same credence and weight by other Board members in their deliberations whether I cast one or two votes when the matter was eventually voted upon. Since I was a meaningful participant able to influence the outcome of a vote [sic].
> Maniscalco Affidavit, ¶ 19.

48. Thus, the interest of assuring "meaningful participation to the lesser populated boroughs in Board affairs" need not be achieved at the expense of one person, one vote compliance. Equal votes for each borough president are simply not necessary to achieve meaningful representation and participation for Staten Island. Therefore, this valid interest does not constitute a justification for deviating from representation based on relative population in the Board scheme.[20]

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[20] The only conceivable one person, one vote objection to weighted voting is not a complaint that defendants or *amicus* Marchi have proffered. Weighted voting schemes fail to provide equal *numbers of representatives* per population base. In other words, an argument can be made that if Staten Island has one representative for its 350,000 people, then Brooklyn ought to have six representatives to serve its 2.2 million people if meaningful representation is to be assured. Plainly, this is not a complaint for defendants or *amicus* whose primary concern seems to be Staten Island. This is a concern of Brooklynites who look to cases such as *WMCA* v.

(footnote continued on following page)

(6) *A Check on Executive Authority.*

49. No doubt the Board's current powers constitute a check on mayoral authority. The simple fact that the City's chief executives all meet and compromise, and that the Mayor can be outvoted, achieves a substantial limitation on the Mayor's powers. See Appendix to Plaintiffs' Motion for Summary Judgment, Documents 6 and 7. However, it is again the case that equal voting among the borough presidents is unnecessary to achieve this interest. As long as the Board as a whole controls substantial executive decisions, it is not critical that each member have an equal vote. As long as each member is meaningfully represented by a vote that can make a difference, the check on executive authority will be accomplished by the Board as a whole. Thus, this interest, like the others cited above, is not served by perpetuating equal voting power for each borough president. Therefore, checking executive authority is not a justification for deviating from strict population equality in voting power.

(footnote continued from previous page)

Lomenzo, 238 F. Supp. 916 (S.D.N.Y.) *appeal dismissed*, 379 U.S. 986, *aff'd*, 382 U.S. 4 (1965) *vacated in part as moot*, 384 U.S. 887 (1966) in which the court held that fractional voting in the state's legislative scheme was unconstitutional. The court, however, expressly reserved the question of whether fractional voting is constitutional at a municipal level of government. Id. at 924, fn. 2. Of course, since *Iannucci* v. *Board of Supervisors, supra*, in 1969, most county boards of supervisors have employed weighted voting schemes. See e.g. *Greenwald* v. *Board of Supervisors, supra; League of Women Voters* v. *Nassau County Board of Supervisors, supra*. The interest in having the same number of legislators per population base conflicts with the legitimate interest in preserving the small size of a Board. Clearly one solution which allows retaining a smal Board in a scheme that combines large and small districts, is a weighted voting scheme as described above. But see Ex. F.

CONCLUSION

50. The sum and substance of the submission of evidence and arguments by the defendants' and *amicus* Marchi is that many reasons exist to respect Staten Island as a county and that direct representation by the borough president on the Board is desirable to achieve this interest. Though plaintiffs dispute a number of defendants' and *amicus'* characterizations of the history and evidence, plaintiffs do not at this juncture dispute these ultimate points. But what is plain from the evidence and arguments of defendants and *amicus* Marchi is that an equal vote for each of the borough presidents is unnecessary to Staten Island's future role on the Board and in the City. Defendants and *amicus* Marchi's arguments for an equal vote on the Board are a blatant appeal for preservation of an outdated, unconstitutional system which guarantees Staten Island overrepresentation that it does not require. This plea contradicts the very arguments the defendants and *amicus* Marchi present concerning the collegial and deferential operations of the Board. Nevertheless, this appeal to the *status quo* is made at the expense of the voting rights of citizens in the larger boroughs who also have a claim on their fair share of the vote.

51. Notwithstanding all of the defendants' claims of political necessities, historical commitments, special needs, integrity of local government, lack of prejudice and so forth, it cannot be forgotten that the preeminent consideration in voting rights cases is the right of each voter to have an equal share of voting power. The unbroken promise of the Supreme Court in this regard has been to assure equal voting power by assuring that "[p]opulation is . . . the starting point for consideration and the controlling

criterion for judgment in . . . apportionment controversies." *Reynolds* v. *Sims*, 377 U.S. 533, 567 (1964). To this end plaintiffs have offered a Board scheme which both respects population and the essence of meaningful participation by the lesser populated boroughs. Since such schemes have been thoroughly tested and analyzed for two decades in the county board of supervisor system in this state and, thus, have been readily available for use by the Board, the defendants cannot be said to have engaged in "a good faith effort to construct districts . . . a nearly of equal population as is practicable." Id. at 577, *see also, Brown* v. *Thomson, supra,* at 77 L. Ed. 2d at 222. In the end, the failure of the current Board scheme to allow for any and all population changes dooms it. Every county system has complied with this fundamental precept. Of course, no deviations this large, by any measure, have ever been tolerated by any courts of which plaintiffs are aware. Certainly, such deviations cannot be tolerated where, as here, no legitimate interest is served by equal votes distributed among unequal population groups.

Dated: April 12, 1985
New York, New York

Respectfully submitted,

/s/ Richard Emery
Richard Emery, Esq.
New York Civil Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 382-0557

Exhibit (D): Annexed to the Affirmation of Richard Emery

UNITED STATES DISTRICT COURT

Eastern District of New York

81 Civ. 3290 (ERN)

Beverly Morris, et al.,

Plaintiffs,

—against—

Board of Estimate, et al.,

Defendants.

Affidavit of Lee Papayanopoulos

I, Lee Papayanopoulos, being duly sworn upon oath, depose and say as follows:

1. I am the Director of Information Technology and Senior Research Scholar and Adjunct Professor at the Business School of Columbia University as well as Associate Professor of Quantiatative Studies at Rutgers University. My complete vitae is attached hereto.

2. For the last seventeen and a half years, I have been retained by between 30 and 40 county boards of supervisors in New York State to compute voting weights which are then assigned to town representatives in order to comply with one person, one vote structures as set forth by the New York Court of Appeals in *Ianucci* v. *Board of Supervisors,* 20 N.Y. 2d 244, 282 N.Y.S. 2d 502 (1967). I undertake these computer analyses by comparing the relative

populations of the various towns which comprise a county board of supervisors and then I search for weighted votes which provide each town a percentage of the total decisive voting combinations which most closely reflects each town's proportion of the county's population. In this way voting power for each town's representative is closely adjusted to each town's population in the overall county scheme.

3. I have recently discussed a weighted voting scheme for the Board of Estimate with Professor Steven Brams of New York University and have reviewed the results of his computer search for appropriate weighted votes. Given the desirability of finding a simple scheme which provides minimal deviations for voting situations with and without the Mayor's participation in voting, I believe that Professor Brams' scheme is a good one. It has the advantage of maintaining identical weighted votes whether a 110 vote or 90 vote Board is voting. If this aspect of the scheme were to be abandoned and different weights assigned for each voting scheme, it is likely that even lower deviations could be achieved.

4. In general, in designing weighted voting schemes for county boards of supervisors I have achieved total extreme relative deviations of about 4%. Generally, the New York State courts require a total relative deviation that is as small as practicable based upon a thorough computer search.

5. The Board of Estimate presents no difficult problems for designing a weighted voting scheme. It can be treated just like any of the many county boards of supervisors that rely on weighted voting schemes. The fact that the Board of Estimate is dominated by the three citywide

officials does not change the fact that the borough presidents are the local representatives of their constituencies which vary dramatically in population size. The fact that these local representatives must come together, interact, compete for the attention of the citywide officials and ultimately vote on issues, means, under one person, one vote doctrine, that their voting power like county boards of supervisors, may be apportioned in proportion to population. Of course, the current Board of Estimate does not respect population variations among the boroughs, just as many county boards of supervisors did not respect population variations among towns before 1967.

6. In conjunction with preparing this affidavit I reviewed the papers submitted by defendants and *amicus* Marchi asserting numerous interests alleged to justify the huge voting dilution perpetuated by the current Board of Estimate scheme. These justifications fall into six categories: (1) historical factors, (2) natural boundaries; (3) integrity of political subdivisions; (4) effectiveness; (5) meaningful participation of the lesser populated municipal entities; and, (6) a check on executive power. It is notable that these very interests are the same interests which are of substantial concern to the participants in most of the schemes I have designed for county boards of supervisors. The towns which comprise New York's counties each have their own history, boundaries, integrity, desire for a voice, need not to be dominated and desire to have effective county government. County government is the primary building block of state government under the New York State Constitution. County government determines how each of the towns within a county will fare. County government predominates over town government as the primary

Exhibit D Annexed to the Affirmation of Richard Emery

base of local governing authority. Thus, every town has an overriding concern that county government will respect its special needs and integrity.

7. The way this is accomplished is by means of a weighted voting scheme. Weighted voting schemes parcel out voting power to towns in a manner that guarantees each town its fair share, its voice on the critical votes. Because every town representative knows that he or she has a meaingful share of the critical votes, deference and collegiality develop which usually avoid close (critical) votes. But when critical votes do occur every town knows that its voice means something.

8. As I understand it, this is exactly the situation which exists in the present Board of Estimate except that Staten Island and the Bronx have far more than their fair share of voting power. Under the circumstances described by the defendants and *amicus* Marchi, I can see no good reason not to institute a weighted voting scheme such as that which is employed by county boards of supervisors (e.g. Professor Brams' scheme), which respects all of these special interests. Such a scheme is, in my opinion, the most rational method of achieving democratic representation for small districts which must co-exist with large districts within a governing body. I have prepared just such plans on many occasions for more than half of the counties in New York State.

/s/ Lee Papayanopoulos
Lee Papayanopoulos

Sworn to before me this 10th day of April, 1985.

/s/ Richard Emery
Notary Public

Exhibit (E): Annexed to the Affirmation of Richard Emery

UNITED STATES DISTRICT COURT

Eastern District of New York

81 Civ. 3290 (ERN)

Beverly Morris, et al.,

Plaintiffs,

—against—

Board of Estimate, et al.,

Defendants.

Affidavit of Professor Steven J. Brams, and Appendix: Alternative Voting Systems

I, Steven J. Brams, being duly sworn upon oath, depose and say as follows:

1. I am a professor in the Department of Politics at New York University. I have offered my opinions and expertise in this case previously, and this Court has referred to my views in its August 21, 1984, opinion in this case. My previous affidavit and my vitae are included in plaintiffs' Appendix in support of their motion for summary judgment.

2. At the request of plaintiffs' counsel, I and a colleague, Dean Paul J. Affuso of the New York University Graduate School of Business Administration, undertook an extensive computer search for the optimal weighted votes which

could be assigned to each of the borough presidents in order to provide each borough president with a proportion of "critical votes" (situations in which that borough president's votes can change the outcome) commensurate with the population of that borough.* Our computer search turned up thousands upon thousands of possibilities. We chose a set of weights and a voting decision rule that reflects the current Board of Estimate scheme better than any other that we examined, based on an exhaustive search defined by the assumptions given in paragraphs 3 and 6 below.

3. By giving the citywide representatives 20 votes each for a total of 60 votes, and the borough presidents a total of 50 votes (in order to avoid fractional votes), and assigning a decision rule requiring 58 (out of a total of 110) votes to win (a bare majority of 56 votes does not provide an optimal fit), the best-fitting voting weights, with voting-power percentages and deviations from population percentages, are the following:

* For technical definitions of this measure of voting power (due to John F. Banzhaf, III) and related measures, and efficient algorithms for computing voting power, see [2], which is reference 2 in the List of References in the Appendix to this Affidavit that gives full citations of the sources used. See also [3] for a recent application of the Banzhaf measure to weighted voting in the European Community Council of Ministers.

Borough	Voting Weight	Population % (1983 estimates)	Banzhaf Voting Power %*	Relative Deviation from Optimal Power**
Staten Island	3	5.2	5.3	+1.2
Bronx	8	16.3	15.8	−3.1
Manhattan	10	20.1	21.1	+4.7
Queens	13	26.6	26.3	−2.2
Brooklyn	16	31.5	31.6	0.0
Total	50	100%	100%	

4. Under this scheme, each citywide member will have 20 votes, giving each 18.9% of all critical votes (percent of voting power). The voting power of the three citywide members totals 56.8%. The five borough presidents with 50 votes have total voting power of 43.2%

5. As is clear from the above table, each borough president controls a percentage of critical votes virtually proportional to the population he or she represents. The maximum relative deviation between the most overrepresented and underrepresented boroughs is 7.8% (4.7% + 3.1% for Manhattan and the Bronx, respectively) from absolute population proportionality.

6. For a 90-vote board, without the Mayor participating, a similar scheme is possible using exactly the same voting weights for each borough and employing a 48-vote decision rule (48 votes required to win instead of 58 in the 110-vote board). This scheme gives the following results:

* The Banzhaf Voting Power % of a particular representative is simply the percent of all situations in which that particular representative can cast a critical vote.

** Relative Deviation from Optimal Power is the difference between the voting power and population percentages, divided by the population percentage and multiplied by 100. (For Staten Island, for example, this difference is 5.3 − 5.2 = 0.1, divided by 5.2, which is 1.2% after rounding of exact values.

Exhibit E Annexed to the Affirmation of Richard Emery

Borough	Voting Weight	Population % (1983 estimates)	Banzhaf Voting Power %	Relative Deviation from Optimal Power
Staten Island	3	5.2	4.8	— 8.4
Bronx	8	16.3	14.3	—12.4
Manhattan	10	20.1	20.6	+ 2.7
Queens	13	26.9	27.0	+ 0.3
Brooklyn	16	31.5	33.3	+ 5.8
Total	50	100%	100%	

7. In the 90-vote board (without the Mayor), the two citywide officials have 47.9% of the voting power (24.0% each), and the five borough presidents have 52.1% of the power. The maximum relative deviation between the most overrepresented and underrepresented boroughs is a rather high 18.2% (5.8% + 12.4% for Brooklyn and the Bronx, respectively). Given the rarity of the 90-vote scheme and the appeal of simplicity in maintaining the same voting weights for both the 110-vote and 90-vote scheme, perhaps this relative deviation is tolerable. More fundamentally, however, it appears that *no* weighted voting assignments, giving equal weights to the two citywide officials greater than any of the five borough presidents, can give a better fit.

8. I have thoroughly reviewed the most recent affidavits and exhibits submitted to the Court by the defendants and *amicus* Marchi. I have especially reviewed the asserted interests in historical factors, natural boundaries, integrity of political subdivisions, effectiveness of the Board, meaningful participation in Board affairs by the less-populous boroughs, and limiting executive authority. I do not agree that any of these interests should take precedence over a fair, democratically based representative system.

Exhibit E Annexed to the Affirmation of Richard Emery

9. To this end, I describe herewith in the Appendix to this Affidavit three alternative voting systems giving the larger boroughs more representatives rather than votes, any one of which I believe would far better serve all the citizens of New York than the present Board scheme. Each seems to me a system competitive with the weighted-voting scheme recommended herein and therefore should be considered a serious candidate in future deliberations about possible reforms of the present board.

10. It is clear that equal votes for each of the borough presidents is untenable for achieving the interests the defendants and *amicus* Marchi have identified. Equal votes for each borough president is merely an arbitrary "weighted" voting scheme—assigning 20% of voting power to each borough president—that is not reflective of borough population differences and does not respect any measure of voting power in relation to population. Such a scheme changes the "one-person, one-vote rule" into a "one-county, one-vote" rule. Under a Banzhaf weighted-vote analysis, the present system produces a relative-deviation overrepresentation of 285% for Staten Island and a relative-deviation underrepresentation of 37% for Brooklyn. By any standard, these are unacceptable deviations from a proper distribution of voting power intended to mirror the population differences.

/s/ Steven J. Brams
Steven J. Brams

Sworn to before me this 9th day of April, 1985.

/s/ Name Illegible
Notary Public

APPENDIX: ALTERNATIVE VOTING SYSTEMS

Instead of weighting the votes of borough presidents to give them voting power commensurate with the borough populations, one could assign representatives to each borough roughly in proportion to their populations. For example, if Staten Island is used as the standard for a district and given one representative, each borough would receive the following numbers of representatives:

	Representatives
Staten Island	1
Bronx	3
Manhattan	4
Queens	5
Brooklyn	6
Total	19

A simply majority of 10 out of 19 could be used to enact bills in such a legislature. Such a body could be expanded to include at-large members, such as the three citywide officials (Mayor, Comptroller, and City Council President), with one or more of these officials given certain prerogatives, such as a veto. But for purposes of the subsequent discussion, a legislature of 19 members will be assumed.

Three different systems for the election of representatives might be considered and will now be briefly described.

1. Adjusted District Voting

Each borough would be divided into equal-size districts (except for Staten Island), and each voter would be able to vote for one representative (or more under "approval

voting"; see system 3 below for a description of this kind of voting). The candidate with the most votes in each district would win.

In order to ensure that different *interests* are represented citywide, each candidate would be required to run as a nominee of one political party, which could include the traditional political parties as well as any new parties that might form that meet certain minimum requirements (e.g., petition signatures, campaign funds raised, etc.). Thus, for example, parties might form along different ethnic, racial, or religious lines, or on substantive issues such as educational reform, environmental controls, and so on.

If any party's candidates received *in toto* (i.e., across all boroughs) more than some minimum percentage of the citywide vote (perhaps 5 or 10 percent), but it won a smaller percentage of seats, it would be entitled to additional representatives up to—but not to exceed—the percentage of its citywide vote. This adjustment would occur after the district elections. (Such adjustments are allowed in Puerto Rico under specified conditions; in West Germany and other West European countries, adjustments involve adding a fixed—not variable, as recommended here—number of representatives on the basis of the national vote.) Representatives of each underrepresented party would be added to the winning candidates already elected from each of the 19 districts to increase the size of the legislature.

But such a variable-size legislature, under certain conditions, might create incentives for a party to "throw" district elections because it could benefit more from adjustments after the election ([6]; [7]). These incentives can

be eliminated by placing certain limits on the number of representatives that can be added in the adjustment phase.

A test of this system in the 1983 British general election, wherein the Alliance of the Liberal Party and the Social Democratic Party won 25.3% of the national vote but only 3.5% of the Parliamentary seats (it came in second in many Conservative and Labor districts), showed that the Alliance could be given a total of 21.1% of the seats in an enlarged Parliament before such an incentive would develop. This adjustment would have brought it rather close to its proportion of the national vote (25.3%), giving the interests of its supporters much greater representation than they received in the district elections (3.5% see [7] for details).

2 Limited Voting in Each Borough

Each borough would be given the number of seats indicated above but there would be no districts within each borough. Each voter could vote for exactly one candidate in his or her borough, and those candidate(s) with the most votes would win. This system of limited voting, which is used in the United States, Japan, and other countries, would allow smaller parties to win one or more seats in the larger boroughs if their supporters concentrated their votes on one (or a very few) candidates.

Limited voting contrasts with a system in which voters in each borough can vote for as many candidates as there are seats to be filled, which would permit a majority (or plurality) party to win all the seats because minorities, even by concentrating their votes on one candidate, could not overcome the votes that a majority (or plurality) could place on each of its candidates for all seats. Unlike adjusted district voting, however, voters would not have their

"own" representative (except in Staten Island, where there is only one) because representatives would be borough-wide.

3. Successive Approval Voting

Approval voting is a voting system in which voters can vote for as many candidates as they wish in an election with more than two. In single-winner elections, it tends to elect the strongest candidate overall (i.e., the one most approved of), whereas plurality voting—vote for exactly one candidate—frequently elects the strongest minority candidate in a crowded field ([1]; [4]; [5]).

But when electing a legislature, approval voting would not seem a good voting procedure. This is because a majority or plurality party by voting for all its candidates, can elect all of them—or at least as many as there are seats to be filled—and the minority will go unrepresented.

Assume, however, that approval votes are counted in the following manner:

Round 1. The candidate with the most votes wins the *first seat.* The approval ballots of all voters who voted for this candidate are *discarded,* for these voters have gotten at least one (approved) representative elected.

Round 2. The candidate with the most votes on the approval ballots that remain wins the *second seat,* and the ballots of those who voted for him are discarded.

Subsequent rounds. Seats are successively filled, and ballots discarded, until all seats are filled. [Should all ballots be discarded before all seats are filled, each voter will have at least one (approved) representative, and the remaining seats might be filled by seating the highest-ranking

candidates on the first round who were not already elected.]

Successive approval voting (SAV)

I. *Maximizes* the number of voters who have one or more (approved) representatives in the legislature;

II. *Encourages* sincere *bullet* voting, because this strategy best ensures that a candidate's single best candidate will be elected—provided that this candidate's "electability" is perceived to be the same as that of all other candidates.

Since there are as yet no published articles on SAV, it is worth describing some of its implications in greater detail than either of the previously described systems. First, there are at least two qualifications to II above:

1. If one's best candidate is perceived to be a *dark horse,* a voter might do better by voting for less preferred but more electable candidates *in addition* so as to maximize the probability of electing at least one acceptable candidate;

2. If one's best candidate is perceived to be the *front-runner,* a voter might do better by voting for less-preferred candidates *instead* so his ballot will not be discarded after the front-runner is elected and thereby he may help elect still other acceptable candidates. (Of course, if everyone reasons this way, the front-runner may lose his front-running status and consequently may not be elected.)

It would appear that SAV is "monotonic," because approving of a candidate can never hurt him or her. Interestingly, though, "twins" who share approval votes may be hurt. For if A has a twin B, and all voters who vote for B also vote for A, then a focal voter who votes for just

A when no other voters do will elect A when A and B are tied with the most votes. But this will eliminate B since all approval ballots on which B is supported will be discarded when A's ballots are discarded.

SAV may be complicated by allowing for the transfer of "surplus votes," round by round, as under the Hare system of single transferable vote (STV) ([8]; [9]). Thus, for example, if A beats B by a 3-to-2 margin on the first round, instead of discarding all ballots on which A is approved, these ballots would be retained but each approval vote on them would be discounted by ⅔—under the assumption that each A supporter needed to expend only ⅔ of his on her approval votes to elect A over B on the first round Thereby, all approval votes on A-supporter ballots would count as ⅓ of a vote on the second round, and similar discounting—including discounting of already discounted ballots—would occur round by round.

This discounting would mean that voters who supported a candidate who is elected on any round would still be able to influence subsequent choices (with discounted votes) if the candidate who won on this round won with a surplus of votes. No voter, of course, would ever be able to expend more than one full vote on the entire set of candidates who is elected. On the other hand, voters who approved of no candidates who were elected would expend no votes and hence not directly influence the outcome, though they might have indirect influence through their effect on surplus votes, which are a function of what (next-best) losing candidates receive.

The advantage of transferring surplus votes is that a voter can directly influence the selection of more than one candidate rather than having his influence terminated after only one candidate he approves of is elected. This fact

should diminish his or her need to make strategic calculations generally, and discourage bullet voting in particular (if this voter finds several candidates acceptable). Its disadvantage is the complications of transfers and discounting, which, judging from experience with STV, few will understand.

Summary

Adjusted district voting has the advantages of giving voters their own representatives (from districts) and giving party interests approximate proportional representation. Its disadvantage is that it will inevitably generate controversy over the drawing of district lines in all boroughs except Staten Island. Under limited voting, voters in the four larger boroughs would not have their own representatives, but minority candidates could get elected. They also could under successive approval voting, in which voters can better express themselves by voting for more than one candidate in a borough, but it is harder to understand and would require computerization of vote counting to be feasible.

All the above systems give voters in the larger boroughs more representatives, not more votes (as under weighted voting). This is advantageous if it is felt that one person from these boroughs cannot adequately represent the entire interests of the borough.

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9. Fishburn, Peter C., and Steven J. Brams. "Some Paradoxes of Preferential Voting." *Mathematics Magazine* 56, no. 5 (September 1983): 207-214.

Reply Affidavit of John J. Marchi, Read in Support of the Continuation of the Present Structure of the Board of Estimate, dated April 19, 1985

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81 Civ. 3290 (ERN)

BEVERLY MORRIS; JOY CLARKE HOLMES; JOANNE CPUSTIL,

Plaintiffs,

—against—

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of New York, CAROL BELLAMY, as City Council President, HARRISON J. GOLDIN, individually and as Comptroller for the City of New York, HOWARD GOLDEN, ANDREW STEIN, STANLEY SIMON, DONALD MANES, RALPH LAMBERTI, each individually and as Borough Presidents of the Boroughs of the City of New York,

—and—

FRANK V. PONTERIO,

Intervenor-Defendant,

ROBERT A. STRANIERE, individually and as a member of the New York State Assembly,

Intervenor-Defendant.

Reply Affidavit of John J. Marchi

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

JOHN J. MARCHI, being duly sworn deposes and states:

1. I submit this Reply Affidavit in order to clarify and highlight some of the statements made in my Affidavit and in the supporting Affidavits annexed as exhibits to my Affidavits which were previously submitted to this Court and which have been referred to, and in some instances, misinterpreted in the Affirmation of Richard Emery and the Affidavit of Alan Rothstein.

2. The Affidavit of Loring McMillen traces the period leading up to Richmond County's entry into Greater New York in 1898 and concludes that:

> "the citizens and officials of Richmond County of the late 1890s would never have chosen to give up their own county form of government or their plans to pursue an independent city form of government if they knew, or even suspected that they or their successors would not have a meaningful voice in the major decisions that affected their county."
>
> (McMillen Affidavit ¶ 19, *see also* Marchi Affidavit ¶¶ 10-11)

Mr. Emery not only concedes the validity of the argument that Staten Island would never have chosen to consolidate unless its citizens believed they would have meaningful representation in New York City governance, he states that it is a position with which "of course plaintiffs do not disagree." (Emery Affirmation ¶ 30). Mr. Rothstein takes exactly the opposite position, stating that "any notion that

this argument has validity must be put to rest . . . with absolutely nothing in the record of the case support[ing] the argument." (Rothstein Affidavit ¶ 26). Mr. Rothstein further states that there is no evidence that Staten Islanders understood that the borough would have any power over its affairs out of proportion to its population. In fact, citing the Trautmann Affidavit, he concludes that "in all probability obtaining a disproportionate share of power was not their major concern." (Rothstein Affidavit ¶ 29) Neither the McMillen Affidavit nor the Marchi Affidavit (nor any Affidavit submitted in support of the defendants' position) states that the Staten Islanders of 1898 had as a major concern obtaining a disproportionate share of power. However, as is pointed out in both the McMillen Affidavit (¶¶ 11-12, 15-16) and the Marchi Affidavit (¶¶ 7-12), the people of Richmond County gave up their own county form of government in which they were directly responsible for electing the officials who made the determinations which impacted upon their county, and also gave up their plans to pursue the route of adopting their own city form of government, in order to become part of New York City. It is illogical to suggest that such action would have been taken if it had been anticipated that major decisions affecting their county could be made over which they would have no control. Indeed, the McMillen Affidavit, quoted above, states that such action in favor of consolidation would never have been taken if the result urged by the plaintiffs in this case was anticipated.

3. Both the Emery Affirmation (¶ 32) and the Rothstein Affidavit ¶¶ 8, 12) take a portion of a statement concerning the pre-1958 Board structure in the Maniscalco Affidavit out of context and leave out the critical

conclusion of that statement. Both Emery and Rothstein quote from a few sentences of Mr. Maniscalco's statement (Maniscalco Affidavit ¶ 19) in which he states that before 1958, when the Borough Presidents of Staten Island, Bronx and Queens had only 1 vote on the Board (as compared to 2 votes for the Borough Presidents of Brooklyn and Manhattan and 3 votes for the Citywide Officials), he was a meaningful participant in the Board's deliberations. From this, they (Emery and Rothstein) conclude that if the Board's voting structure is changed on a pure population basis, the Borough President of Staten Island would still be a meaningful participant. This is directly contradicted by the last sentence in that same paragraph 19 of the Maniscalco Affidavit in which he states "if, however, I only had 1/6th of a vote, I would have no meaningful presence and would not have, I believe, been treated as a credible Board member."

The Emery/Rothstein conclusion is also contradicted by the plaintiff's own expert who previously stated in material submitted to this Court that if the Board of Estimate is reapportioned according to borough population, Staten Island's Borough President would be "a mere observer in the Board's deliberations" (Kramarsky "The Structure, Powers and Functions of New York City's Board of Estimate," *see* p. 27 Marchi *Amicus* brief).

The Emery/Rothstein conclusion is also disputed by a simple look at the number of votes cast by the pre-1958 Board members and the number of votes which would be cast under the weighted voting scheme urged by the plaintiffs. Before 1958, the Borough Presidents of Staten Island, Bronx, and Queens each cast 1 vote, out of a total of 16 votes, on the Board. With each Citywide Official casting 3 votes and the other 2 Borough Presidents casting

2 votes each, there are numerous grouping of officials in which that 1 vote of Staten Island, Bronx or Queens could make a difference in the outcome. As a corollary to that, Brooklyn and Manhattan with its 2 votes each could make a difference in the outcome but could not operate to automatically discount any vote of the smaller boroughs. This is certainly not the case in the result urged by the plaintiffs in our instant case. Here, as outlined in the Emery Affidavit (¶ 46) and in the Brams Affidavit (¶¶ 3-7), Staten Island would have a total of 3 votes out of 110 votes cast, with no possible way to influence any vote. Brooklyn, on the other hand, with its 16 votes could, by casting its votes with 2 Citywide Officials, make up a majority of the votes. Despite the statement of Mr. Emery that such a voting structure does not result in making the Staten Island Borough President a "by-stander," the numbers clearly show that the opposite is true. Mr. Emery concedes the necessity of the Staten Island Borough President's vote being "viewed as potentially critical" (¶¶ 31-32) and unequivocally states that "any member who is purely a by-stander will not serve the interest of guaranteeing meaningful representation." (¶ 44) This, I believe, is precisely the point.

4. The Rothstein Affidavit makes reference to the statements in various Affidavits that a meaningful role of the Borough President on the Board of Estimate has heightened with importance as the powers of the Borough Presidents have been diminished (¶¶ 38-39). While Mr. Rothstein does not dispute the accuracy of the notion that the Borough President's powers have been greatly diminished in this century (in fact he states at ¶38 that the 1938 and 1963 Charter substantially reduced the role of borough government), he states that there has been no *quid pro quo* in reducing borough government and increasing the

power of the Board (¶ 35). None of the Affidavits I submitted advance the theory of such a *quid pro quo*—rather, as I, Maniscalco and McMillen point out, with the decrease in the role of borough government has come an increase in the importance to the people of the individual boroughs or having meaningful representation on the Board of Estimate which makes such vital decisions impacting upon their boroughs (Marchi Affidavit ¶ 18; McMillen Affidavit ¶ 17; Maniscalco Affidavit ¶ 24).

5. Both Mr. Emery and Mr. Rothstein discuss in their submissions the arguments advanced in the Marchi Affidavit and Straniere Affidavit concerning the rights possessed by the counties throughout the State. (Emery Affimation ¶¶ 19-22; Rothstein Affidavit ¶¶ 30-32), with both gentlemen missing the central point. In my previous affidavit (¶¶21-25), *Article IX of the Constitution* which contain the "Bill of Rights for Local Government" is discussed. This "Bill of Rights" recognized that the "expansion of power for effective local self government is a purpose of the people of the state," and provided "guarantees against impairment of the powers of one municipality by the exercise of local legislative powers by another" (Marchi Affidavit ¶ 22). This "Bill of Rights" specifically excluded the counties wholly included within a city (the 5 counties of New York City are the only such counties in the State) not to carry out a legislative intent to deprive the people of those counties of their rights to effective local self government but in recognition of the uniqueness of the City of New York (*see* Jaffe Affidavit) and in full cognizance of the fact that governmental structure of the City provided each county with a meaningful role in their governance. As previously stated I am convinced that

Reply Affidavit of John J. Marchi

"if the result the plaintiffs are advocating in this lawsuit was anticipated by state officials in the early 1960s, this statute would never have been passed without the inclusion of safeguards for the self governance of all sixty-two counties, including the five counties of New York City."

6. Based upon the foregoing, and all the papers previously submitted, I respectfully request that this Court find that there are sufficient policies and interests to justify the continuation of the present structure of the Board of Estimate.

Dated: April 19, 1985

/s/ John J. Marchi
John J. Marchi

Sworn to before me this 19th day of April, 1985.

/s/ Patricia E. Perez
Notary Public

Affirmation of Susan R. Rosenberg, Read in Reply to Some of the Points Raised by Plaintiffs and Defendants' *Amicus Curiae*, dated April 22, 1985

UNITED STATES DISTRICT COURT

Eastern District of New York

81 Civ. 3290 (ERN)

Beverly Morris, et al.,

Plaintiffs,

—against—

The Board of Estimate, et al.,

Defendants.

—and—

Frank V. Ponterio,

Intervenor-Defendant,

—and—

Robert A. Straniere, etc.,

Intervenor-Defendant.

Susan R. Rosenberg, an attorney duly admitted to practice in the courts of the State, affirms to the truth of the following under penalty of perjury:

1. I am an Assistant Corporation Counsel in the office of Frederick A.O. Schwarz, Jr., Corporation Counsel of the City of New York, attorney for defendants (other than intervenor-defendants). I am fully familiar with the facts

and circumstances of this action and make this affirmation in reply to some of the points raised by both plaintiffs and *amicus curiae* Citizens Union. Specifically, defendants address the comments made as to remedy.

2. The first point to be made is that all this discussion is premature and, we submit, inappropriate. The issue before the Court is not remedy, but the underlying merits. On that, there are serious issues, in our view, with respect to whether the Court properly ignored the effect of the three City-wide members in making its finding of malapportionment, and with respect to justification. In any event, as the Court will remember from *Andrews* v. *Koch,* 528 F. Supp. 246 (E.D.N.Y. 1981), *aff'd,* 688 F. 2d 815 (2d Cir. 1982), the appropriate—and regularly employed—procedure in the event a final judgment is reached by the courts that a governmental body violates the one person, one vote doctrine is to give the local authority an opportunity to consider alternatives and come up with a plan. *Wise* v. *Lipscomb,* 437 U.S. 535, 539 (1978); *Connor* v. *Finch,* 431 U.S. 407, 414-415 (1977); *Chapman* v. *Meier,* 420 U.S. 1, 27 (1975); *Gaffney* v. *Cummings,* 412 U.S. 735, 749 (1973). Judicial relief becomes appropriate only when the locality fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so. *Reynolds* v. *Sims,* 377 U.S. 533, 586 (1964). This is because local governmental bodies are the institutions that are the best situated to identify and then reconcile traditional state policies within constitutional mandates. *Connor* v. *Finch, supra* at 415.

3. During the course of this case, plaintiffs have jumped from scheme to scheme, starting with the idea that there

should be a wholly new body with substantial additional members to replace the Board of Estimate. This received a negative reaction as expensive, cumbersome and essentially duplicative of the City Council. Now, plaintiffs are primarily stressing a weighted voting scheme in which the boroughs remain the representative districts and the membership of the Board remains the same, but in which the borough representatives are assigned a number of votes in proportion to their boroughs' respective population. But the weighted voting concept that plaintiffs now seem to prefer illustrates the underlying fallacy of ignoring the three City-wide members. What plaintiffs propose is that the votes of the borough presidents be weighted so that the Brooklyn representative would have 16 votes and then the others be scaled down to 3 for Staten Island. But in doing so, plaintiffs, once again, completely ignore the relationship between the borough members and the City-wides. Thus, plaintiffs would leave each City-wide member with 20 votes. Does it really make sense that one borough president, representing 31.5% of the City's population, should have 80% of the voting power of the Mayor, Comptroller and City Council President, all of whom have been elected by the City as a whole? This just highlights, in our view, the error in ignoring the three City-wide members of the Board in deciding if there is malapportionment in the first place.

Dated: April 22, 1985
New York, N.Y.

/s/ Susan R. Rosenberg
Susan R. Rosenberg

Affirmation of Susan R. Rosenberg

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

SUSAN R. ROSENBERG, being duly sworn, says that on the 22nd of April, 1985, she served the annexed Affirmation upon the attorneys for the respective parties as listed below, by depositing a copy of the same, enclosed in a postpaid wrapper in a post office box in the Borough of Manhattan, City of New York.

Richard Emery, Esq.
Attorney for Plaintiffs
New York Civil Liberties Union
132 West 43rd Street
New York, New York 10036

Frank V. Ponterio, Esq.
Intervenor-defendant *pro se*
766 Pelton Avenue
Staten Island, New York 10310

Hon. Robert A. Straniere
Intervenor-defendant *pro se*
182 Rose Avenue
Staten Island, New York 10306

Hon. John Marchi
Amicus Curiae
358 St. Mark's Place
Staten Island, New York 10301

Affirmation of Susan R. Rosenberg

Alan Rothstein, Esq.
Amicus Curiae
198 Broadway
New York, New York 10038

/s/ SUSAN R. ROSENBERG
SUSAN R. ROSENBERG

Sworn to before me this 22nd day of April, 1985

/s/ ELISE WINTERHOFF
Notary Public

Reply Affidavit of Robert A. Straniere, Read in Support of the Present Voting Structure and Allocation of Seats on the Board of Estimate, dated May 2, 1985

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81 Civ. 3290 (ERN)

BEVERLY MORRIS; JOY CLARKE HOLMES; JOANNE OPLUSTIL,

Plaintiffs,

—against—

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of New York, CAROL BELLAMY, as City Council President, HARRISON J. GOLDIN, individually and as Comptroller for the City of New York, HOWARD GOLDEN, ANDREW STEIN, STANLEY SIMON, DONALD MANES, RALPH LAMBERTI, each individually and as Borough Presidents of the boroughs of the City of New York,

Defendants,

—and—

FRANK V. PONTERIO,

Intervenor-Defendant,

ROBERT A. STRANIERE, individually and as a member of the New York State Assembly,

Intervenor-Defendant.

Reply Affidavit of Robert A. Straniere

STATE OF NEW YORK,
COUNTY OF NEW YORK, SS.:

ROBERT A. STRANIERE, a member of the New York State Assembly and an attorney duly licensed to practice law in the State of New York, being first duly sworn, deposes and says:

1. I am an Intervenor-Defendant in the above-entitled matter and I am fully familiar with the facts and circumstances of this action. I submit this Reply Affidavit in response to Affidavits filed on behalf of the plaintiffs and *amicus curiae* Citizens Union.

2. Clearly, one of the fundamental principles upon which our nation and government was founded is that of equality of right. This principle is articulated within the Equal Protection Clause of the Fourteenth Amendment and it is this element of our Constitution which provides the underlying basis of the plaintiff's action.

3. It is equally clear, however, that the Equal Protection Clause was never intended to restrain the normal exercise of governmental power, but only *abuse* in the exercise of such authority. *Louisville & Nashville Railroad Co.* v. *Melton*, 218 U.S. 36 (1910) (emphasis added). The Equal Protection Clause requires not that a state never distinguished between citizens, but only that the distinctions that are made not be *arbitrary* and *invidious*. *Avery* v. *Midland County*, 390 U.S. 474 (1968) (emphasis added). It is for these very reasons that this Court has been directed to consider not just the level of deviation from population equality that may exist within the voting structure on the Board of Estimate, but also, to consider those

State policies and interests which the United States Supreme Court has held may justify such deviation.

4. The underlying issue in this action is not one grounded upon some alleged abuse in the exercise of governmental authority. In fact, plaintiffs have previously acknowledged that the membership and voting structure of the Board of Estimate was not created by some arbitrary and invidious exertion of governmental authority, but instead, was intended "to effect compromise between local and citywide interests by seating together borough and citywide officials." *See* Plaintiffs' Memorandum of Law in Support of Their Motion for Summary Judgment, dated December 16, 1983, at p. 4. The plaintiffs have also agreed that the current makeup of the Board has, at least in the past, advanced several State policies and interests including the "ability to balance differing interests and needs, and to accommodate development and long-term planning requirements of both the boroughs and the City as a whole." *See* "Joint Stipulation of Policies and Interests Served by the Board of Estimate, dated October 18, 1984, at p. 7. But while the plaintiffs do not dispute the fact that the Board "is needed" and "it works," specifically pointing out that "the Board serves its function well," *see* paragraph #5, *Affidavit of Richard Emery,* plaintiffs take the position that a Board structured to comply more strictly to a one person, one vote formula could just as well serve its purposes, if not better.

5. I am not unmindful of the possibility that there may be "better" alternatives in the governing of a unique and diversified City of New York. It is the nature of our society to seek to develop legally acceptable changes and

"better ways" to achieve a goal or produce a better product. Along these lines, I myself proposed that the State Legislature study possible alternatives to the structure of government in New York City in June of 1983, immediately following the ruling by the Second Circuit that the one person, one vote principle applied to the City's Board of Estimate. At that time, I had prepared for introduction legislation that directed the creation of a ten-member, bi-partisan legislative commission empowered to make a comprehensive review of the possible options for change in the structure of government within the City. Similar legislation has been introduced during this 1985 Legislative Session. But whether or not there exists alternatives to the governance of our City is also not an issue that is before this Court at this time. The sole question that remains to be decided is whether the policies and interests that have been put forward in papers submitted by and on behalf of the defendants can justify the degree of deviation this Court has determined exists on the Board.

6. Throughout my participation in this litigation, I have argued from a State policy standpoint. It is not just simply that Staten Island's interests will not be represented if a strict one person, one vote formula is applied to the Board of Estimate. To some extent, Bronx County will suffer a similar diminution of representation on the Board. The point is that a rational State policy of blending local and citywide interests, which all parties have agreed is effectuated by the Board's current membership and allocation of voting power, will be effectively eliminated if any of the number of proposed alternatives advanced by the plaintiffs is implemented.

7. Mr. Emery has done a good job of exaggerating my arguments by addressing them as if they were independent and unrelated to the above rational State policy which is central to this action. I have not suggested, as Mr. Emery would have this Court to believe, that just because Staten Island is still recognized as a county of the State the Island's borough president should be given a vote equal to the other borough presidents. Nor have I contended that simply because Staten Island has the greatest proportion of undeveloped land its residents should have their individual votes count more than the residents of the other boroughs. But the facts of the matter are that Staten Island is still a county of this State (one of the fastest growing in the State), it does hold the greatest proportion of undeveloped City-owned land and when these facts are considered in the context of blending borough and city-wide interests, that rational policy becomes vital to every Staten Islander. To destroy such a policy would, in effect, disenfranchise an entire county from the participation in local government decisions; decisions which have the most profound effect on the daily lives of that county's citizens.

8. The plaintiffs' own evidence confirms the fact that a strict application of a one person, one vote formula would reduce the status of Staten Island's representative on the Board to that of a "mere observer." It is this end result that I have characterized as a "tyranny of pure numbers." The alternatives that have been proposed in the plaintiffs' papers amount to no more than a "variation" on that "theme."

9. Thus, reduced to its lowest terms, this court must decide whether the long-standing policy of blending the

interests of each and every borough (or county) with city-wide interests, as advanced by the Board, should be allowed to continue, not simply in light of the City's history and geography, but most importantly, in light of the enormous impact that the Board's future decisions will continue to have on the citizens of the lesser populated counties of New York City.

10. For all the foregoing reasons, and all the papers that have previously been submitted, I respectfully request that this Court find that there are sufficient policies and interests that justify the present voting structure and allocation of seats on the Board of Estimate, as provided by sections 61 and 62 of the New York City Charter.

/s/ Robert A. Straniere
Robert A. Straniere

Sworn to before me this 2nd day of May, 1985.

/s/ Philip S. Straniere
Notary Public

Reply Affirmation of Frank V. Ponterio, Read in Partial Reply to the Affirmation and Exhibits in Support of Summary Judgment, dated May 2, 1985

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81 Civ. 3290 (ERN)

BEVERLY MORRIS, et al.,

Plaintiffs,

—against—

THE BOARD OF ESTIMATE, et al.,

Defendants.

—and—

FRANK V. PONTERIO,

Intervenor-Defendant,

—and—

ROBERT A. STRANIERE, etc.,

Intervenor-Defendant.

Frank V. Ponterio, an attorney duly licensed to practice law in the State of New York affirms the following under penalty of perjury:

1. I am an intervenor-defendant in this action and have previously submitted my credentials to this Court.

Reply Affirmation of Frank V. Ponterio

2. This affirmation is submitted in partial reply to the Affirmation and Exhibits in Support of Summary Judgment, dated April 12, 1985, submitted by counsel for plaintiffs.

3. Although the current round of papers was supposed to address only the issue of justification for the Board malapportionment found by this Court, plaintiffs have submitted proposed remedies reflecting their application of a voting power analysis. This affirmation is limited to a refutation of the remedies portions of plaintiffs' submittal.

4. Plaintiffs now concede the fairness and constitutionality of proportional weighted voting power as an apportionment criterion. Counsel for plaintiffs states that representational schemes designed to apportion voting power in accordance with population percentages are "fully reflective of constitutional requirements". Affirmation of Richard Emery, p. 27.

5. It is important to bear in mind that equalizing representation (i.e., same number of citizens per legislator) and equalizing voting power (i.e., same percentage voting power as percentage of total population) are mutually inconsistent criteria where represented entities of considerably differing populations are represented in a single body. The very purpose of applying voting power apportionment is to give relatively small constituent entities a meaningful role in decision making that would otherwise be denied them if represensation were based on equalizing the number of citizens per legislator. Necessarily this results in large deviations in the apportionment criterion stated in *Reynolds* v. *Sims*, 377 U.S. 533 and mechanized and *Abate* v. *Mundt*, 403 U.S. 182.

6. In the affidavit of Professor Steven J. Brams in Support of Plaintiffs' Motion for Summary Judgment, Brams offers a remedy for Board malapportionment based on a weighted voting scheme, and presents accompanying voting power analyses. Brams' analyses are wrong and his remedy is unnecessary. The accepted methodology for performing voting power analyses has been described by another of plaintiffs' experts, Dr. Lee Papayanapoulos, as follows:

(a) List all voting combinations

(b) Count those which are critical to the first member; repeat for the second member, the third, etc.

(c) Add all counts obtained in (b)

(d) Divide each number in (b) by the sum (c) and multiply by 100. This is a percentage of the relative voting power of each member. Exhibit C to Affidavit of Donald J. Werner, Counsel to Edward J. Hart, Esq., attorney of record for defendant Nassau County Board of Supervisors in opposition to plaintiffs' multi-branched motion, *League of Women Voters* v. *Nassau County Board of Supervisors,* Eastern District Court, 82 C 1607 (J.M.).

These percentages are then compared with the population of each constituent municipality, expressed as a percentage of the total population represented by the board. In his affidavit, Brams departs from this procedure. Without explaining or justifying his departure, he computes a voting power percentage by dividing each borough member's counts, as in step (b), by the total of only borough member counts instead of dividing by the total of *all* counts,

as in step (d). This alleged measure of voting power is meaningless. It ascribes an aggregate voting power to borough members alone of 100%, as shown in Brams' table in paragraph 3., p. 2 of his affidavit. How can borough members hold 100% voting power when they have only 5 of the 11 Board Votes? Obviously, due to the presence of the city-wide members, the aggregate borough-member voting power in Brams' reconstituted Board is only 43.2%, as Brams himself acknowledges in paragraph 4., p. 2 of the same affidavit. Brams simply contradicts himself. He commits the same mistake in ascribing 20% voting power to each borough member on the Board as presently constituted. It is important to recognize, as Brams apparently does not, that a voting power analysis measures a member's ability to affect vote outcomes, and there are no vote outcomes of borough members alone. Brams blatantly misstates the Banzhaf voting power index. Banzhaf defines voting power as the ratio of the "number of possible voting combinations of the *entire body* (emphasis added) in which (a member) can alter the outcome by changing his vote" to the number of "All possible voting combinations for a given body". Banzhaf III, John F., "Multi-Member Electoral Districts—Do They Violate the "One Man, One Vote" Principle", 75 Yale L.J. 1309, 1316. Of course, the Brams contradiction results from his attempt to extend this Court's two-tiered representation hypothesis to his purported voting power analysis. Whatever validity this hypothesis may hold for representational analyses, it has no validity to any sensible analysis of voting power. It is beyond argument that the Board votes as a single body. There is no clandestine under-Board composed only of borough members. The sole criterion for Board action is total Board votes. No distinction is made in the Board's

voting rules as to the origin of votes, except for the quorum rule, and that rule makes it even clearer that there is no such thing as borough-only voting power since it requires the presence of at least two city-wide members. Rule 6., Rules of Procedure for the Conduct of the Business of the Board of Estimate.

7. A voting power analysis of the full Board that follows the accepted analysis procedure and correctly computes percentages is shown in Table A. The norms against which deviations are measured are derived to account for the division of borough and city-wide voting power incorporated in the Board's voting rules. Accordingly, the norm voting power of each borough member is his corresponding borough's population percentage multiplied by the ratio of total borough votes to total Board votes (5/11). This gives an aggregate borough voting power of 5/11 or 45.45% divided among the boroughs in exact proportion to borough populations. The remaining voting power of 54.55% is divided equally among the three city-wide members (18.18% each). Without realizing it, Brams closely approaches this division of power in his proposed Board (43.2% and 56.8% respectively).* A comparable analysis of the Nassau County Board of Supervisors, taken from the Second Circuit's decision in *League of Women Voters* v. *Nassau County Board of Supervisors*, 737 F. 2d 155, 159 and supplemented to include that Board's 72-vote majority rule is shown in Table B. As is evident from Table A, the maximum deviation of voting power (12.08%) is negligibly larger than the 11.9% deviation approved in *Abate* and

* Had Brams designed a perfectly apportioned Board, its voting power apportionment division between borough and city-wide members would have been exactly 45.45% and 54.55% respectively.

TABLE A

VOTING POWER ANALYSIS
BOARD OF ESTIMATE (FULL BOARD)

Member	No. of Votes	Norm Vote Power*	Majority		2/3 Majority		3/4 Majority	
			Vote Power	% Deviation	Vote Power	% Deviation	Vote Power	% Deviation
Brooklyn	1	14.34	8.70	—5.64	9.09	—5.25	9.38	—4.96
Queens	1	12.16	8.70	—3.46	9.09	—3.07	9.38	—2.78
Manhattan	1	9.18	8.70	—0.48	9.09	—0.09	9.38	+0.20
Bronx	1	7.51	8.70	+1.10	9.09	+1.58	9.38	+1.87
Staten Island	1	2.26	8.70	+6.44	9.09	+6.83	9.38	+7.12
Mayor	2	18.18	18.84	+0.66	18.18	0	17.71	—0.47
Comptroller	2	18.18	18.84	+0.66	18.18	0	17.71	—0.47
Council Pres.	2	18.18	18.84	+0.66	18.18	0	17.71	—0.47
		100%	100%		100%		100%	

* Equal to % of total population × 5/11 for each borough member; 1/3 of remainder for each city-wide member

Maximum Deviation = 12.08% (All Cases)

TABLE B

VOTING POWER ANALYSIS
NASSAU COUNTY BOARD OF SUPERVISORS

Town	No. of Votes	Norm Vote Power	65-Vote Majority		72-Vote Majority	
			% Vote Power	% Deviation	% Vote Power	% Deviation
Hempstead	58	55.92	53.85	—2.07	52.17	—3.75
Oyster Bay	22	23.12	21.15	—1.97	19.57	—3.55
North Hempstead	15	16.53	17.31	+0.78	19.57	+3.04
Long Beach	7	2.58	5.77	+3.19	6.52	+3.94
Glen Cove	6	1.86	1.92	+0.06	2.17	+0.31

* Equal to % of total population

Maximum Deviation = 5.26% (65-Vote Majority); 7.69% (72-Vote Majority)

considerably less than the 16.4% deviation approved in *Mahan* v. *Howell*, 410 U.S. 315. Furthermore, in achieving this small deviation, the Board deviates less on a representational basis (by the *Abate* test) than does the Nassau County Board of Supervisors. *Abate* analyses of both Boards are shown in Tables C and D. As indicated, the Nassau County Board has a maximum deviation of 156.46% compared with 132.85% for the worst-case (i.e., borough-only) analysis of the Board of Estimate adopted by this Court. A corresponding voting power analysis of the mayorless Board with equivalently small deviations is shown in Table E.

No remedy is needed. No justification for current apportionment is needed. The Board as presently constituted meets the constitutional standards applied in *League of Women Voters*, and there is no rational basis for requiring the Board of Estimate to be judged by stricter constitutional standards than those applied to the Nassau County Board.

8. A few comments are in order with respect to the unthinking use of computers to manage human affairs and the undeserved reverence sometimes accorded ivory-tower academicians. Brams attempts to lend legitimacy to his flawed analysis by referring to his examination of "thousands upon thousands" of computer runs. In the era before computers, we analysts had to think problems through before creating large volumes of paper trash. Computers are useful for performing calculations but they are no substitute for the human mind. To illustrate, consider the Nassau County Board of Supervisors. It too is the product of thousands upon thousands of computer runs. Nevertheless, with paper and pencil and a mathematical expertise

TABLE C

ABATE ANALYSIS
BOARD OF ESTIMATE

Borough	1980 Population	No. of Members	Population Per Member	% Deviation From Norm
Brooklyn	2,230,936	1	2,230,936	—57.75
Queens	1,891,325	1	1,891,325	—33.74
Manhattan	1,427,533	1	1,427,533	— 0.94
Bronx	1,169,115	1	1,169,115	+17.33
Staten Island	352,121	1	352,121	+75.10
Totals	7,071,030	5	(Norm) 1,414,206	

Maximum Deviation = 132.85%

TABLE D

ABATE ANALYSIS
NASSAU COUNTY BOARD OF ESTIMATE

Town	1980 Population	No. of Members	Population Per Member	% Deviation From Norm
Hempstead	738,517	2	369,258.5	—67.64
Oyster Bay	305,750	1	305,750	—38.81
No. Hempstead	218,624	1	218,624	+ 0.74
Long Beach	34,073	1	34,073	+84.53
Glen Cove	24,618	1	24,618	+88.82
Totals	1,321,582	6	(Norm) 220,263.67	

Maximum Deviation = 156.46%

TABLE E

VOTING POWER ANALYSIS
BOARD OF ESTIMATE (MAYORLESS BOARD)

Member	No. of Votes	Norm Vote Power*	Majority		2/3 Majority	
			Vote Power	% Deviation	Vote Power	% Deviation
Brooklyn	1	17.53	10.77	—6.76	10.71	—6.82
Queens	1	14.86	10.77	—4.09	10.71	—4.15
Manhattan	1	11.22	10.77	—0.45	10.71	—0.51
Bronx	1	9.19	10.77	+1.58	10.71	+1.52
Staten Island	1	2.77	10.77	+8.00	10.71	+7.94
Comptroller	2	22.22	23.08	+0.86	23.21	+0.99
Council Pres.	2	22.22	23.08	+0.86	23.21	+0.99
		100%	100%		100%	

* Equal to % of total population × 5/9 for each borough member; 1/2 of remainder for each city-wide member

Maximum Deviation = 14.76% (Both Cases)

limited to the ability to add, it is a simple matter to prove that Glen Cove can cast a critical vote only if Hempstead's two members vote against each other. Except in this extremely unlikely circumstance, Glen Cove's voting power is zero. So much for computerniks.

9. Based upon a) plaintiffs' concession that voting power is an appropriate measure of Board apportionment, b) the Second Circuit's decision in *League of Women Voters* upholding the apportionment of a board with greater representational deviations than the Board of Estimate, and c) the foregoing voting power analysis, it is respectfully requested that plaintiffs' motion for summary judgment be denied, and that this Court reconsider its decision on the degree of current Board malapportionment and find that Board apportionment is facially constitutional, even absent any justification based upon legitimate state interests.

Dated: Staten Island, N.Y.
May 2, 1985

/s/ FRANK V. PONTERIO
Frank V. Ponterio
Intervenor-defendant, *pro se*

Supplemental Reply Affirmation of Frank V. Ponterio, Read in Reply to a Letter With Enclosures, from Richard Emery to This Court, dated May 17, 1985

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

81 Civ. 3290 (ERN)

BEVERLY MORRIS, et al.,

Plaintiffs,

—against—

THE BOARD OF ESTIMATE, et al.,

Defendants.

—and—

FRANK V. PONTERIO,

Intervenor-Defendant,

—and—

ROBERT A. STRANIERE, etc.,

Intervenor-Defendant.

Frank V. Ponterio, an attorney duly licensed to practice law in the State of New York affirms the following under penalty of perjury:

1. I am an intervenor-defendant in this action and have previously submitted my credentials to this Court.

2. This affirmation is submitted in reply to a letter, with enclosures, from Richard Emery, Esq. to this Court, dated May 17, 1985.

Supplemental Reply Affirmation of Frank V. Ponterio

3. By agreement among the parties and the Court, I was permitted one week to respond after receipt of the Emery letter and enclosures. That material was received by me on May 22, 1985, therefore service and filing of this affirmation on or before May 29, 1985 is timely.

4. The day after receiving the Emery letter, I contacted Professor John F. Banzhaf III by telephone in an effort to assist the Court in resolving the differences between Brams' analyses and mine, and to put an end to the litany of criticism and counter-criticism over methodology issues. I supplied Prof. Banzhaf with copies of Reply Affirmation of Intervenor Defendant Ponterio, dated May 2, 1985, Exhibits D and E to Emery's Affirmation and Exhibits in Support of Summary Judgment, dated April 12, 1985 (the Papayanopoulos and Brams exhibits), annotated computer printouts of the results of my voting power analyses, and Rules of Procedure of the Board of Estimate. I also described briefly the history of this action from its inception. This contact resulted in Banzhaf's letter to this Court dated May 22, 1985.*

5. Brams' accusation that I am "badly confused," Memorandum, Brams to Emery, dated May 10, 1985, para. 1., is put to rest by paragraphs 2. and 3. of the Banzhaf letter. Banzhaf recites the identical criticisms of Brams' purported Banzhaf voting-power index calculations as I did in my previous affirmation. It is obviously Brams, not I, who is confused.

6. Banzhaf also states in paragraphs 1. and 4. of his letter that the methodology I used to quantify current

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* Attached hereto as Exhibit 1.

Board malapportionment (my "norm vote power" percentages) has no mathematical basis. I don't disagree. The relevant point is that, whether it has a mathematical basis or not, it follows the method used by the Courts in a line of cases from *Ianucci* v. *Board of Supervisors of the County of Washington,* 282 N.Y.S. 2d 502 (1967) to *League of Women Voters* v. *Nassau County Board of Supervisors,* 727 F.2d 155 (1984). To form a perfectly apportioned Board consistent with these decisions, I simply divided the 45.45% borough voting power among the boroughs in accordance with their population percentages. Banzhaf's quarrel is not with my methodology but with the Courts'. It is a restatement of his contention that equal representation for districts of equal size is not achieved by equalizing the number of legislators per citizen-voter. Banzhaf cites an example of two districts. One district has 10,000 people and one representative. A second district has 40,000 people and four representatives.

> "Proponents will argue that the voters are equally represented because . . . there is one representative for every 10,000 people. Despite its simplistic appeal, this argument is fallacious.
>
> There is no justification here for simple division; the resulting product has no meaning. Although at first glance it might seem to be a logical operation, there is no mathematical theory to support it."
>
> "Multi-Member Electoral Districts—Do They Violate the "One Man, One Vote" Principle," 75 Yale L.J. 1309, 1329.

Nevertheless, the Courts have decided repeatedly that equality of representation is achieved by such simple division and, more to the point, that equality of voting power is achieved by apportioning the voting power of district representatives on a board in a accordance with district population percentages, and not by equalizing the voting power of individual citizens by Banzhaf's or any other method. The near-perfectly-apportioned Board that Brams proposes, like mine, follows these Court decisions, as is evident when voting power is computed correctly.

7. Banzhaf recommends that voting power apportionment of the Board be decided by applying a different measure from that used by the Courts in *Ianucci* and *League of Women Voters.* The measure is *citizen* voting power as distinguished from *district* voting power. District voting power as applied in *League* is simply the ability of a Board member to affect the outcome of Board votes. It takes no account of the voting power of citizens to elect their district representatives (district populations are used only to establish the standards against which deviations are measured). Banzhaf's proposed measure, viz., citizen voting power, is the ability of each citizen to affect the outcome of Board votes acting through his representatives. Calculation of this measure is a two-step procedure. First, a calculation is made of an individual citizen's ability to affect the outcome of the election of his representative. Banzhaf demonstrates that this ability is equal to $\sqrt[1]{2\pi N}$, where N is the district population *Id.*, fn. 28. at 1323. Second, a calculation is made of the ability of that representative to affect Board vote outcomes, exactly as is done, for example, in *League.* The product of these two indices is defined as a citizen's voting power, i.e., his ability to affect Board vote outcomes via his representative. This methodology rests on Banzhaf's contention that equality

of "effective" representation is achieved for districts of unequal population when the number of representatives, or votes, is apportioned according to the square-root of population, not according to population itself. For the current Board, traditional apportionment methodology would dictate that Brooklyn have six times as many representatives or votes as Staten Island because it has six times Staten Island's population. Banzhaf's methodology would dictate that Brooklyn have 2½ ($\sqrt{6}$) times as many representatives or votes as Staten Island. This methodology, mathematically pure as it may be, was explicitly rejected by the Supreme Court in *Whitcomb* v. *Chavis,* 403 U.S. 124 (1971).

8. The relevant point is that the desire for mathematical purity should not completely displace common sense, no matter which methodology is used. No methodology is free of serious flaws. Banzhaf's criticism of the *Abate* equal-number-of-citizens-per-legislator criterion is soundly based in mathematics. District voting power analyses such as used in *League* rely upon an *a priori* assumption that all combinations of Board votes are equally probable, and exclude fundamental real-life factors such as bloc voting, give-and-take exchanges among members, and a host of political influences. Use of *a priori* assumption is justified when nothing is known about the true operation of a board. After decades of experience with the Board of Estimate and the Nassau County Board, use of such *a priori* assumptions is indefensible. As for Banzhaf's citizen voting power analysis, it also rests on shakey assumptions. It assumes, for example, that each board member's vote follows the will of a majority of his constituents (as if the result of a poll of constituents on each vote). Applying

this assumption to the Board leads to a result that is obviously untrue. Since the three city-wide members have the same constituency, the Banzhaf assumption implies that they always vote alike. Of course they do not. And if they did, all borough members would have zero voting power since the three city-wide members control a majority of votes. The list is endless. In fairness to Banzhaf, it should be noted that he states his assumptions in his several law journal articles on this subject. However, once stated, they are put aside. The plain fact is that the results of all apportionment analyses are more dependent on the assumptions that underlie them than the mathematical formulas that implement them. Real people don't conduct themselves to suit the formulas of mathematical purists. Common sense is an essential ingredient in both the selection and application of any analysis method.

9. Fortunately, this battle of methodologies is a tempest in a teapot. As will become evident, whether the Court-sanctioned district voting power analysis or Banzhaf's methodology is applied to the Board, the result is the same. Malapportionment of the Board is small, and within constitutional bounds.

I have performed a number of additional analyses in response to Banzhaf's recommendations. First, I have computed the Banzhaf citizen voting power index for the Board of Estimate and the Nassau County Board of Supervisors. For the Board of Estimate, a citizen's voting power is the sum of his ability to affect Board vote outcomes via the city-wide members (the same for all citizens) and his ability to affect such outcomes via his borough president (different in each borough). In particular:

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Citizen Voting Power = power to elect mayor × mayor's vote power
+ power to elect comptroller × comptroller's vote power
+ power to elect council president × council president's vote power
+ power to elect borough president × borough president's vote power

Table A presents the comparative results. The Board is shown to be not seriously malapportioned and far better apportioned than the Nassau County Board. The result is not surprising since the Nassau County Board was apportioned without consideration of the ability of each citizen to elect his board member and that ability varies greatly among the Nassau towns. It also varies greatly among the five boroughs, but the influence of the borough members is diminished by the presence of the city-wide members (each affects only about 9% of board votes while city-wide members affect 55% of votes, and citizen voting power as to city-wide members is the same for all citizens).

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TABLE A

Current Board of Estimate
(Full-Board, Simple Majority)

Citizen voting power = $^{1}\sqrt{2 \pi N^{1}}$, where N = population of district (borough or city)

Power of citizen to elect a city-wide member = .00015003 (N = 7,071,030)

Combined voting power of 3 city-wide members = 56.52%

Citizen voting power via 3 city-wide members = .0001500 × .5652 = .00008480

Borough	Citizen's Power to Elect Borough Member	Borough Member Voting Power	Citizen's Voting Power Via Borough Member	Citizen's Total Voting Power Via All Members	% Deviation From Average Voting Power
Brooklyn	.0002671	.08696	.000023226	.00010803	— 4.36
Queens	.00029009	.08696	.000025225	.00011002	— 2.59
Manhattan	.0003339	.08696	.000029035	.00011383	+ 0.78
Bronx	.00036896	.08696	.000032083	.00011688	+ 3.48
Staten Is.	.0006723	.08696	.000058461	.00014326	+26.84

Population-Weighted Average Total Voting Power = .00011295
Maximum Deviation = 4.36 + 26.84 = 31.20%

Nassau County Board of Supervisors
(65-Vote Majority)

Town	Citizens Power to Elect Supervisor	Supervisor Vote Power	Citizen's Voting Power	% Deviation From Average Voting Power
Hempstead	.00046423	.5385	.00024999	+22.81
Oyster Bay	.00072148	.2115	.00015259	—25.04
N. Hempstead	.00085322	.1731	.00014769	—27.45
Long Beach	.00216125	.0577	.0001247	—38.74
Glen Cove	.00254263	.0192	.00004882	—76.02

Population-Weighted Average Voting Power = .00020356
Maximum Deviation = 22.81 + 76.02 = 98.83%

Second, I have synthesized a Board apportioned in accordance with Banzhaf's square-root theory for equalizing citizen voting power and used it as a standard against which to measure deviations in borough member's voting power on the current Board. Taking Staten Island as a unit district, the number of votes assigned to each borough member is as follows:

Borough	Ratio of Population to Population of Staten Is. (N)	Equalized No. of Votes ($\sqrt{N}$)	Assigned No. of Votes ($10\sqrt{N}$)*
Brooklyn	6.336	2.517	25
Queens	5.371	2.318	23
Manhattan	4.054	2.013	20
Bronx	3.320	1.822	18
Staten Is.	1.000	1.000	10
		Total	96

* Scaling by factor of 10 used to avoid fractional votes

The city-wide members are assigned 39 votes each so that the total number of Board votes is 213 (and the split between city-wide and borough votes is 55%—45% as on the current Board). A majority is taken as 117 votes (the sum of all city-wide votes as with the current Board). Table B shows the voting power of each member of the current Board, the corresponding voting power for synthesized "perfectly apportioned" boards following Court-sanctioned methodology (Brams and Ponterio boards) and the Banzhaf methodology. Also shown are the deviations of voting power on the current Board measured against each of the "perfect" Boards. It is obvious that it is un-

necessary to grapple with theoretical mathematical controversies. The results are virtually the same no matter which theory of equalization is embraced. It should be noted that the only difference between the Brams and Ponterio boards is that Brams attempted to find a specific embodiment of a perfect Board and fell slightly short of perfection, while I simply defined the theoretically perfect percentages without attempting to implement them. My board is simply the goal that Brams sought. In any event, the differences are trivial.

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TABLE B

BOROUGH VOTING POWER AND DEVIATIONS (%)

Board Member	Current Board	"Banzhaf" Board Power	"Banzhaf" Board Dev.	Brams Board Power	Brams Board Dev.	Ponterio Board Power	Ponterio Board Dev.
Brooklyn	8.7	11.6	—2.9	13.6	—4.9	14.3	—5.6
Queens	8.7	11.6	—2.9	11.4	—2.7	10.9	—2.2
Manhattan	8.7	9.3	—0.6	9.1	—0.4	9.2	—0.5
Bronx	8.7	7.0	+1.7	6.8	+1.9	7.5	+1.2
Staten Island	8.7	2.3	+6.4	2.2	+6.5	2.3	+6.4

Maximum Deviations

"Banzhaf": 2.9 + 6.4 = 9.3%
Brams: 4.9 + 6.5 = 11.4%
Ponterio: 5.6 + 6.4 = 12.0%

Note: Because of the effects of the city-wide members on board voting power, assigning borough votes in accordance with the square-root theory does not necessarily ensure equalized *total* (via city-wide and borough members) citizen voting power. In this sample, the deviations are small (under 4%) except for Staten Island which is under-represented by 12.4%. Time did not permit the several iterations that are required to yield a better result. If a perfect result were obtained, i.e., equal *total* citizen voting power, the comparison would be as shown below:

BOROUGH VOTING POWER AND DEVIATIONS (%)

Board Member	Current Board	Perfect "Banzhaf" Board Power	Perfect "Banzhaf" Board Dev.
Brooklyn	8.7	11.83	—3.13
Queens	8.7	10.89	—2.19
Manhattan	8.7	9.46	—0.76
Bronx	8.7	8.56	+4.00
Staten Island	8.7	4.70	+4.00

Maximum Deviation = 3.13 + 4.00 = 7.13%

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Finally, I have extended the calculations of individual citizen voting power to determine the aggregate citizen voting power of each borough (acting through its borough member and all three city-wide members). This is done simply by adding up the citizen voting power of all the citizens in each borough. The results are shown in Table C. It is obvious that the differences between aggregate borough voting powers and corresponding borough population percentages are remarkably small (maximum deviation less than 3%).

TABLE C

BOARD OF ESTIMATE
AGGREGATE CITIZEN VOTING POWER OF BOROUGHS

Borough	Aggregate Citizen Voting Power Numerical	Aggregate Citizen Voting Power % of Total	Population Percentage	Percent Deviation
Brooklyn	240.998	30.17	31.55	—1.38
Queens	208.093	26.05	26.75	—0.70
Manhattan	162.502	20.35	20.19	+0.16
Bronx	136.650	17.11	16.53	+0.58
Staten Is.	50.445	6.32	4.98	+1.34
Total	798.689			

Maximum Deviation = 1.38 + 1.34 = 2.72%

10. Although I am not confused by Brams' flawed attempts at arithmetic, I am nevertheless confused by the obvious disarray of arguments on plaintiffs' side. Emery's May 17, 1985 letter objects to my characterization of his weighted-vote Board as a "proposed remedy". Nevertheless, Emery, referring to Brams' proposed board, states "To this end plaintiffs have offered a Board scheme which

respects population and the essence of meaningful participation by the lesser populated boroughs". Affirmation and Exhibits in Support of Summary Judgment, p. 44-5. Emery also submits with his letter a 100 or so page collection of papers dealing largely with remedies. Emery's May 17, 1985 letter states at page 3 that the Board "is simply not a weighted voting scheme" and "is not appropriately analyzed under such a method". Brams, on the other hand, not only characterizes the current Board as an "arbitrary 'weighted' voting scheme" but goes on to analyze it (although incorrectly) by a weighted voting method. Exhibit E to Affirmation and Exhibits in Support of Summary Judgment at paragraph 10., page 4. In its May 21, 1985 letter to this Court, plaintiffs' amicus claims that I erred in computing voting power deviations because I failed to divide the difference between actual vote power and "norm" vote power by a population-related figure. In doing so, plaintiffs' amicus contradicts plaintiffs' own expert, Papayanopoulos, and advances the very calculation that was rejected in *League of Women Voters,* 727 F.2d fn. 15 at 168. Brams also uses the calculation method rejected by the Second Circuit when he characterizes Staten Island's "relative deviation" as 285% $\frac{(20\%—5.2\% \times 100)}{5.2\%}$ instead of 14.8% (20%—5.2%) in his own flawed arithmetic. In doing so, he contradicts himself since, for his proposed board, he computes "relative deviation" as the difference between voting power and population percent without dividing by population percent (paragraph 3., page 2 of his Exhibit).

Emery charges me with blame for attempting to relitigate the methodology issue, but it was he who introduced voting power analyses into these proceedings and necessitated my reply. Plaintiffs no doubt now realize that one of the dangers of shooting from the hip is that you might blow away your toes.

11. The comments of Prof. Banzhaf and my further analyses have, I believe, helped to clarify the methodology issues in this case and make it even more apparent that the Board is in no need of fixing.

/s/ Frank V. Ponterio
Frank V. Ponterio, pro se
Intervenor-defendant
766 Pelton Avenue
Staten Island, N.Y. 10310
(718) 981-7953

Dated: Staten Island, NY
May 29, 1985

Exhibit (1): Annexed to the Supplemental Reply Affirmation of Frank V. Ponterio Submitted to the United States District Court, Eastern District of New York

LETTER FROM JOHN F. BANZHAF, III, TO EDWARD R. NEAHER, CIRCUIT JUDGE, DATED MAY 22, 1985

[Letter Head of The George Washington University]
Washington, D.C. 20052/The National Law Center

Mailing address:
2013 H St. NW
Washington, D.C. 20006
(202) 659-4310

By Express Courier
Overnight Delivery

May 22, 1985

Honorable Edwin Neaher
U.S. District Court
Eastern District of New York
225 Kadman Plaza East
Brooklyn, New York 11201

Dear Judge Neaher:

Re: *Morris* v. *Board of Estimates*, 81 Civ. 3920 (ERN)
Letter in the Nature of Brief Amicus Curiae and Motion for Leave to File Same

I have just learned of the existence of the above-entitled action, and have had an opportunity to read only a few of the submissions in the proceeding on remand to "determine the degree of malapportionment present."

Exhibit 1 Annexed to the Supplemental Reply Affirmation of Frank V. Ponterio

Although I am the inventor and popularizer of the "Banzhaf voting power index," have frequently testified on voting power issues, and have a considerable mathematical background by virtue of an engineering degree from M.I.T., I experienced considerable difficulty in trying to interpret some of the mathematical analyses submitted to the Court. Believing that the Court may likewise experience the same difficulty, I am taking the liberty of writing this letter to briefly offer several views which may be of interest and value to the Court.

This submission is made in the form of a letter only because I understand that a decision by the Court may be imminent. If the Court requires that a formal motion and brief *amicus curiae* be prepared, or that my comments be submitted in the form of an affidavit (as other analyses were), I will, of course, be happy to comply.

My brief comments are as follows:

1. I see no sound mathematical basis for the calculations made by Intervenor Ponterio to determine what he calls the "norm voting power of each borough member" as described on page 5 of his affidavit dated May 2, 1985, and as used in Table A on page 6 of the same affidavit as the basis for his calculation of % deviation (and which tend to support his view that the deviations are small).

2. On the other hand, the figures for "Banzhaf Voting Power %" on page 2 of Professor Steven J. Brams' affidavit dated April 9, 1985 obviously do not represent the Banzhaf-index-calculated voting power of each of the representatives from the five boroughs since the total of the five figures (5.3 to 31.6) is 100%, even though more than half the voting power of the eight-member board lies in the hands (or votes) of the three citywide members. In-

stead, the Banzhaf voting power indexes for five of the eight members of the body have been multiplied by a factor to make them add up to 100%.

3. Intervenor Ponterio apparently objects to this form of analysis—particularly as it is applied to the existing board—since it does not take into account the undisputed fact that the election of citywide members with considerable voting power substantially reduces the effective disparity in voting power between citizens of the five unequal-sized boroughs. For example, as I understand Prof. Brams' technique of analysis, he would find significant "relative-deviation overrepresentation" for Staten Island, and significant "relative-deviation underrepresentation" for Brooklyn, even if there were ten, twenty, or even more citywide members who collectively had 80, 90, or even 95% of the voting power on the body.

4. On the other hand, I am equally unpersuaded by Intervenor Ponterio's attempts to mathematically justify a body on which the votes of the representative from Brooklyn with 2,230,936 residents are equal to the votes of representative from Staten Island with only 352,121 residents.

5. In summary, my initial reading leads me to believe that both techniques of analysis are incorrect and incomplete, particularly when applied to this new situation in which some of the legislators represent all of the people, and others represent only political subdivisions, and both cast weighted votes in the same legislative body.

6. Without necessarily suggesting that it is necessary for this Court to venture even further into the "mathe-

matical quagmire," and mindful that "mathematical exactness or precision is hardly a workable constitutional requirement," it does appear that the Second Circuit's mandate to decide on the "appropriate methodology" for determining the "degree of malapportionment present" does raise "novel issues as to how an individual voter's opportunity to elect these members should be assessed in conjunction with his opportunity to elect his borough representative" [fn 3]. With all due respect, it appears that neither Intervenor Ponterio nor Prof. Brams has seriously addressed—much less clearly resolved—this "novel issue."

7. Fortunately, I have previously developed and written about a more advanced mathematical technique to analyze just such issues in a somewhat analogous context, the Electoral College. See Banzhaf, *One Man, 3.312 Votes, A Mathematical Analysis of the Electoral College,* 13 Villanova L. Rev. 303 (1968). By using a relatively simple extension of my mathematical technique mandated by the New York Court of Appeals in *Iannucci* v. *Board of Supervisors,* 282 N.Y.S.2d 502 (1967), it is possible to calculate the relative ability of a citizen voter to affect the outcome of legislation being considered by a weighted voting body. In this sense the Electoral College (with state-imposed "winner-take-all" voting requirements) is a legislative body employing weighted voting (albeit to make only one decision).

8. I have subsequently used the same more advanced technique of analysis to examine other voting situations, see Banzhaf, *One Man, ? Votes: Mathematical Analysis of Voting Power and Effective Representation,* 36 Geo. Wash. L. Rev. 808 (1968). Using this technique, it is pos-

sible to calculate the relative voting powers of citizens residing in the five different boroughs, and to expressly and precisely take into account that they vote both for citywide representatives and for an additional representative for their own borough.

9. The technique which I have described in these articles is mathematically reasonably simple, and can be carried out easily by any person skilled in the art. For these reasons, the Court may wish to request that one or more of the parties also carry out this form of analysis, and present the results to the Court for its consideration.

10. It is possible, of course, that one or more of the parties may disagree with this type of analysis, and indeed that the Court itself may find the results disquieting. On the other hand, it is a more precise and exact mathematical technique designed expressly to deal with situations such as this, rather than ad hoc extensions of techniques designed to deal with very different situations upon which the parties have apparently relied. In any event, even if the results are not dispositive of the issue of the degree of malapportionment, they may be of value to the Court in resolving the complex issues before it, and in insuring the most complete possible record before the Court of Appeals if review is again sought.

In closing, I wish to assure the Court that I have no direct interest in the outcome of this legislation, nor am I being compensated by—nor seeking compensation from—any of the parties or organizations with such an interest. In short, I have submitted this letter to the Court, and would be willing to further assist the Court in any way appropriate, solely because of my long-standing interest

in voting problems, and my view that it is appropriate for a professor of law to assist courts in matters involving the public interest in which they may have something of value to offer.

I trust the Court will be kind enough to advise me of any action it takes regarding this letter.

Respectfully submitted,

/s/ John F. Banzhaf III
John F. Banzhaf
Professor of Law
(202) 659-4310

JFB:fdr

cc:

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Hon. John Marchi, *Amicus Curiae*
Alan Rothstein, Esq., Counsel for Citizens Union
Frank V. Ponterio, Intervenor-defendant *pro se*

Letter from Mr. Marchi to Edward R. Neaher, Circuit Judge, dated June 11, 1985

John J. Marchi
Attorney at Law
358 St. Marks Place
Staten Island, N.Y. 10301
273-4848

June 11, 1985

Hon. Edward R. Neaher
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, N.Y. 11201

Re: *Morris* v. *Board of Estimate*
81 Civ. 3920

Dear Judge Neaher:

I am writing regarding two submissions recently made to the Court concerning the above captioned case. Mr. Emery provided the Court with some material prepared for and used at a seminar on the governance of New York City sponsored by the Association of the Bar of the City of New York. I was a participant at that seminar. While the written material is certainly interesting and in many ways informative without a transcript or tape of the seminar's oral discussions the material is incomplete and in some ways misleading. Unless a transcript or tape is made available to the Court, I respectfully request that none of the written material be considered.

With respect to Professor Banzhaf's motion to participate as an *Amicus Curiae,* I have no objection. Professor

Letter from Mr. Marchi to Edward R. Neaher, Circuit Judge, dated June 11, 1985

Banzhaf's acknowledged expertise in areas relevant to our case could prove valuable to the Court.

Sincerely,

/s/ John J. Marchi
John J. Marchi

CC: Richard Emery, Esq.
Susan Rosenberg, Esq.
Alan Rothstein, Esq.
Robert Straniere, Esq.
Frank Ponterio, Esq.

No. 87-1112

FILED
JUN 10 1988
CLERK

In The
Supreme Court of the United States
October Term, 1987

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of New York, ANDREW STEIN, individually and as City Council President, HARRISON J. GOLDIN, individually and as Comptroller for the City of New York, HOWARD GOLDEN, DAVID N. DINKINS, FERNANDO FERRER, CLARE SHULMAN, RALPH J. LAMBERTI, each individually and as Borough Presidents of the boroughs of the City of New York,

Appellants,

-and-

ROBERT A. STRANIERE, individually and as a member of the New York State Assembly,

Intervenor-Appellant,

-against-

BEVERLY MORRIS; JOY CLARKE HOLMES; JOANNE OPLUSTIL,

Appellees.

FRANK V. PONTERIO,

Intervenor-Appellant,

v.

BEVERLY MORRIS, JOY CLARKE HOLMES, and JOANNE OPLUSTIL,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF APPELLANT FRANK V. PONTERIO

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QUESTION PRESENTED FOR REVIEW

Whether the combination of at-large and local members of the Board of Estimate in the context of the voting procedures of the Board, creates a system of representation that satisfies constitutional standards for instruments of local government.

THE PARTIES TO THE PROCEEDINGS BELOW

The following parties and *amici curiae* participated in the proceedings before the Court of Appeals:

(i) *Plaintiffs-Appellees:* Beverly Morris, Joy Clarke Holmes, Joanne Oplustil

(ii) *Defendants-Appellants:* THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of New York, ANDREW STEIN, individually and as City Council President, HARRISON J. GOLDIN, individually and as comptroller for the City of New York, HOWARD GOLDEN, DAVID N. DINKINS, FERNANDO FERRER, CLARE SHULMAN, RALPH J. LAMBERTI, each individually and as Borough Presidents of the boroughs of the City of New York,

(iii) *Intervenor-Defendant-Appellants:* Frank V. Ponterio; Robert A. Straniere, individually and as a member of the New York State Assembly

(iv) *Amici Curiae:* John J. Marchi, John F. Banzhaf III, Staten Island League for Better Government, Citizens Union of the City of New York, Peter F. Vallone and other members of the New York City Council

The Municipal defendants and intervenor Strainere have joined in a separate, companion appeal to this Court.

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In The
Supreme Court of the United States
October Term, 1987

FRANK V. PONTERIO,
Intervenor-Appellant,

v.

BEVERLY MORRIS, JOY CLARKE HOLMES, and JOANNE OPLUSTIL,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF APPELLANT FRANK V. PONTERIO

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit, dated October 8, 1987, is reported at 831 F.2d 384 (A5)[1].

The decisions of the United States District Court for the Eastern District of New York, dated August 21, 1984 and November 16, 1986, are reported at 592 F.Supp. 1462 and 647 F. Supp. 1463 (A55, A119).

-- The trial court's rulings came upon remand from the Court of Appeals for the Second Circuit, which, in a deci-

1. Numbers in parentheses preceded by the letter "A" refer to pages in the Appendix submitted with the Jurisdictional Statement. Numbers in parentheses preceded by the letters "JA" refer to pages in the Joint Appendix.

sion dated May 16, 1983, held that the New York City Board of Estimate is subject to the one-person, one-vote principle. This decision, which reversed the initial judgment entered by the trial court, is reported at 707 F.2d 686 (A186).

The first decision of the United States District Court for the Eastern District of New York is reported at 551 F. Supp. 652 (A208).

JURISDICTION

Alleging that the composition and voting structure of the New York City Board of Estimate, as set forth in sections 61 and 62 of the New York City Charter, violates the equal protection clause of the United States Constitution, plaintiffs-appellees Morris, *et al.* sought declaratory and injunctive relief pursuant to 28 U.S.C. Sections 2201 and 2202. Appellees predicated jurisdiction in the trial court upon 28 U.S.C. Sections 1331 and 1343.

The judgment of the United States Court of Appeals for the Second Circuit was entered on October 8, 1987 affirming the trial court's grant of plaintiffs' motion for summary judgment.

A Notice of Appeal to this Court on behalf of Intervenor-Defendant-Appellant Frank V. Ponterio was timely served and filed in the Court of Appeals for the Second Circuit on December 16, 1987. The municipal appellants and Intervenor-Defendant-Appellant Robert A. Straniere served and filed notices of appeal on October 15, 1987 and November 6, 1987 respectively.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. Section 1254(2) in that the Court of Appeals

held a state statute to violate the United States Constitution.

CONSTITUTIONAL PROVISION AND STATE STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The New York City Charter:

Section 61: *Membership.* The mayor, the comptroller, the president of the Council, and the presidents of the boroughs shall constitute the board of estimate.

Section 62: *Voting in the board.*

a. As members of the board of estimate, the mayor, the comptroller and the president of the council shall each be entitled to cast two votes, and the president of each borough shall be entitled to cast one vote.

b. Except as otherwise provided in this charter or by law, the board shall act by resolution adopted by a majority of the whole number of votes authorized to be cast by all the members of the board.

c. No resolution or amendment of any resolution shall be passed at the same meeting of the board at which it is originally presented unless by a three-fourths vote or shall be finally passed except at a meeting open to the public. Prior to a final vote by the board on any resolution or amendment of any resolution members of the general public shall be afforded the opportunity to be heard on such resolution or amendment.

d. A quorum of the board shall consist of a sufficient number of members thereof to cast six votes, including at least two of the members authorized to cast two votes each.

STATEMENT OF THE CASE

Appellees (plaintiffs below), residents of the Borough of Brooklyn within the City of New York, commenced this action in December 1981 seeking declaratory and injunctive relief to remedy their alleged underrepresentation on the Board of Estimate. The Board of Estimate is a municipal body composed of 8 *ex officio* members: the Mayor, Comptroller, City Council President (each of whom has 2 votes on the Board), and the Presidents of 5 boroughs of the City (each of whom has 1 vote on the Board). Plaintiffs complain that equal votes for all Borough Presidents, notwithstanding unequal borough populations, results in a constitutionally unacceptable malapportionment of the Board.

Appellant Ponterio, a resident of Staten Island, intervened as a defendant in March 1982.[2]

Appellees moved for summary judgment in April 1982, and appellants cross moved. On December 1, 1982, the trial court granted appellants' motion dismissing the complaint on the ground that, as a matter of law, the Board is not subject to the one person, one vote doctrine. On May 16, 1983, the Court of Appeals for the Second Circuit reversed and remanded the case for a hearing on whether the Board, as constituted, offends the equal protection clause.

Upon remand, the trial Court bifurcated the case; first to decide upon an appropriate methodology for quantifying malapportionment and the resultant deviation, and second to rule on whether legitimate state interests justified such deviation. Appellant Ponterio submitted proposed analysis methodologies showing malapportionment to be within acceptable bounds and moved to deem methodology issues resolved. Appellees moved for summary judgment on the basis of an alleged deviation of 132.9% obtained by excluding the at-large members from the analysis and computing deviations of actual borough populations from an "ideal" borough population (i.e., one-fifth of the City population). The trial Court issued a

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2. On January 1, 1987 Ponterio took office as a Judge of the Civil Court of the City of New York. Because he believed his continued appearance *pro se* might conflict with the Canons of Judicial Ethics, Ponterio appeared on the second appeal to the Court of Appeals by his daughter, Barbara Ponterio, then a third-year law student, with the Court's permission. Later a New York State Advisory Committee on Judicial Ethics rendered advisory opinions holding that it would be a violation of the Canons of Judicial Ethics for Ponterio to appear *pro se* on this appeal to the Supreme Court but that he could appear by an attorney. Philip G. Minardo, Esq., president of the Richmond County Bar Association, volunteered to represent Ponterio on this appeal.

Memorandum and Order adopting Appellees' methodology and deviation percentage.

Subsequently, the parties and *amici* submitted memoranda of law and affidavits on the justification issue. Appellees re-raised the methodology issue by admitting that a different method, district voting power, is a constitutionally acceptable means for apportioning and analyzing the Board, and presenting a proposed Board reapportionment following (albeit incorrectly) voting power principles. Appellant Ponterio responded with several voting-power analyses showing the Board to be apportioned within constitutional bounds and challenging Appellees' computations as erroneous. Several rounds of argument and counter-argument by appellant Ponterio and Appellees ensued. No other parties participated in these exchanges.

On November 19, 1986, the district court ruled that defendants had failed to justify the adjudged deviation of 132.9%, while acknowledging the legitimacy of historic, geographic and functional reasons advanced in support of the Board's composition and voting system. The court noted the existence of alternative plans with smaller deviations from strict voter equality that would substantially further those state interests. The court did not address the voting power arguments raised by intervenor Ponterio during the justification phase even though those arguments were submitted with the Court's approval.

On October 8, 1987 the Second Circuit affirmed. The Court of Appeals (per Oakes, J.) held that "in calculating voter equality for equal protection purposes the City-wide members should be, if not ignored, not considered in the appropriate analysis" (A33). In a separate concurrence, Judge Newman, while joining the majority, opined that in

some circumstances the equal protection clause might permit local governments to combine "dominant" at-large members with single-member districts of different populations (A51-53).

Ponterio and the City defendants filed separate appeals while defendant Straniere joined in the City defendants' appeal. This Court noted probable jurisdiction on April 4, 1988 and the two appeals were consolidated.

SUMMARY OF ARGUMENT

The Courts below have decided that the people of the City of New York cannot have the form of local government they want because those Courts are unable to analyze an 8-member Board of Estimate except by pretending that it is two boards, one with 5 members and another with 3. This case demonstrates, as no other, the fragility, ambiguity, and inconsistency of the one person, one vote doctrine as it has evolved from the 1964 reapportionment decisions of this Court. Appellant Ponterio asks this Court to finc that innovative forms of local government can survive judicial scrutiny only if it is recognized that fair representation, not an undefinable citizen vote value, is the fundamental requirement of the Fourteenth Amendment.

The Board of Estimate is unlike any other body of local government, just as the City of New York is unlike any other municipality. The Board is specially tailored to the City's needs. It provides fair representation to each constituent borough while assuring majority control. Its constitutionality has been demonstrated by Appellant Ponterio using a district (borough) voting power analysis. The same analysis method has been used extensively in New York State to apportion county boards of supervisors

which, like the Board of Estimate and unlike legislatures, function only by voting.

The Court below elected to analyze a board that does not exist, i.e., a 5-member board of borough presidents, because the arithmetic was simpler. To implement this Procrustean approach, the Court hypothosized facts about the representational attitudes of citizens and Board members that contradict facts presented by the mayor and the Staten Island borough president. Since it was a motion for summary judgment that was before the Court, the decision below should be reversed on procedural, if not substantive, grounds.

ARGUMENT

A quarter century after state legislative districting was brought within the ambit of the Fourteenth Amendment, the one person, one vote doctrine remains an enigma. Grofman and Scrarrow, "The Riddle of Apportionment: Equality of What?", National Civic Review, 242 (1981). In the seminal state apportionment case, *Reynolds v. Sims,* 377 U.S.533, the Court in a sort of judicial putting of the cart before the horse focused on a particular implementation of the doctrine, viz., equal population districting, rather than on a definition of its fundamental basis. Moreover, no unambiguous basis can be inferred since the equal-population-district implementation nominally satisfies several rational bases. *Reynolds* and its five companions decided the same day were severely criticized. "Perhaps the most striking aspect of the "big six" reapportionment cases is their superficial, politically aseptic quality". R. Dixon, "Democratic Representation-Reapportionment in Law and Politics", p. 199, Oxford University Press, 1968 (hereinafter "Dixon"). Chief Justice Warren, apparently in an attempt to paint the doctrine as more than a pragmatic arithmetic dogma, explain-

ed that "fair and effective representation for all citizens is concededly the basic aim of legislative apportionment", *Reynolds,* 377 U.S. at 565-66.

This mixing of input and output, of basis and implementation, also came under criticism by legal scholars.

> A further key element of the majority's constitutional theory was the equating of *districting* based on "equal numbers of people" with an *operating result* of "equal representation." It was assumed unquestioningly that "equal representation" magically arises from creating districts of equal population. The term *"equal population districts"* denotes a verifiable objective concept. But *"equal representation"* is a highly subjective term connoting a hoped-for result. This easy equating of the objective and the subjective is the central inadequacy of the majority's constitutional theory in the 1964 *Reapportionment Decisions.*

Dixon, at p. 269

And Dixon was not alone in pointing out lingering ambiguities in the *Reynolds* decision.

> The key word is "representation." Ostensibly it imports more than the mere right to cast a vote that will be weighed as heavily as the other votes cast in the election. But how much more? The 1964 reapportionment case did nothing to illuminate this problem.
>
> L. Tribe, "American Constitutional Law", second edition, p. 1074, Mineola, NY, The Foundation Press, 1988.

As long as equal population districts provided an easy solution, it was unnecessary to define the problem. Multi-

member districts were not recognized as adding any new substantive dimensions, but only an arithmetic variation. In upholding a county legislative plan for Rockland County, N.Y. in which each of five constituent towns was allocated a number of representatives linearly proportional to its population, this Court simply assumed without argument that such proportionality implements the *Reynolds* criteria. *Abate v. Mundt,* 403 U.S.182. The Court's decision as well as the dissent of Justices Brennan and Douglas dealt exclusively with justification of the plan's deviation from arithmetic perfection without even a hint of a distinction between equal-population districts and equal population-per-representative ratios. In a case decided at the same term, the Court was confronted with a mathematical argument claiming to show that such proportional allocation over-represents the larger districts if representation is measured by the power of a citizen to elect his representatives. *Whitcomb v. Chavis,* 403 U.S. 124. The Court accepted the mathematical argument but dismissed its conclusion. "The District Court did not quarrel with plaintiff's mathematics, nor do we. But like the District Court we note that the position remains a theoretical one. . . .and has not been sufficiently demonstrated, at least on this record, to warrant departure from prior cases." *Whitcomb,* 403 U.S. at 145-46. But what did the Court believe was being equalized in these prior cases? It could not have been representation at the citizen level or the value of a citizen's vote in the election of his representatives. Neither of these is equalized by *Abate*-style apportionment. Consider a plan including several towns, among them town A with 10,000 citizens and one representative, and town B with 20,000 citizens and two representatives. Following *Reynolds* and *Abate*, there would be perfect apportionment. But each citizen in town B has two representatives and the opportunity to muster two votes on his behalf, while each citizen in town A has but one. And what of the argument of plaintiffs in

Whitcomb that, if citizen vote power is to be equalized, representatives should be allocated proportional to the square-root of population? It is at least mathematically (if not psephologically) valid, as the Court itself acknowledged. On the other hand, no mathematical gyrations can show that a citizen's power to elect his representatives is equalized by the linear allocation favored by the Court. Furthermore, the factors cited by the Court as affecting "actual" voting power (party affiliation, race, previous voting characteristics) affect merely the probability of the occurrence of tie votes. Such factors are equally applicable in single-member, equal population districts, as gerrymander decisions acknowledge. In short, the proffered multi-member vote-power analysis is no more theoretical than that assumed in single-member plans.

If the population-per-representative rule does not equalize representation at the citizen level or equalize a citizen's vote power to elect his representatives, it nevertheless appears, intuitively, to achieve a "good" result. It is suggested that this is so because equal-population district plans and equal-population-per-representative multi-member district plans actually implement an equal opportunity for fair *district* representation by equalizing *district* voting power, and this is their only common attribute. The objective of district voting power apportionment is to give each district a voting power proportional to its population. This is automatically achieved in single-member plans and in multi-member plans when population-per-representative ratios are equalized. In a legislature consisting of 100 members, traditional representational analysis would allocate 5 members to a district with 5% of the population on the assumption that such allocation equalizes some citizen-oriented parameter. It does not. But it does allocate to such district 5% of the

legislature's voting power since each member holds a 1% share. It might be said that the right result has been achieved for the wrong reason. This fortuitous result does not obtain in all situations, especially not in the more unique governmental designs, like the Board of Estimate, that are encountered at the lowest, municipal levels of government.

District voting power can be equalized among districts of different populations by allocation of weighted votes rather than multiple representatives. This is a preferable alternative where the small size of a body, such as the 8-member Board of Estimate, is an essential factor contributing to the body's efficient and effective operation. But since weighted votes are always voted as a bloc, the allocation of votes follows a different arithmetic procedure than that used with multiple members. Nevertheless, the objectives are the same, viz., to give each district a voting power proportional to its population. The New York State Courts and the Second Circuit Court of Appeals have approved county government apportionment plans based upon an explicit equalization of district voting power. *Franklin v. Krause,* 32 N.Y.2d 234 (1973) *appeal dismissed,* 415 U.S. 940 (1974), *Iannucci v. Board of Supervisors,* 20 N.Y. 2d 244 (1967) *League of Women Voters v. Board of Supervisors of Nassau County,* 737 F.2d 155 (2d Cir. 1984), *Greenwald v. Board of Supervisors,* 567 F.Supp.200 (S.D.N.Y.), *aff'd without opinion,* 742 F. 2d 1434 (2d Cir. 1983). Of New York's 57 counties outside New York City, 24 have been so apportioned. Grofman & Scarrow, "Weighted Voting in New York," iv Legis L.Q.287,288 (May 1981).

Although apportionment decisions since *Reynolds* continue to be couched in terms of equalization of a citizen's vote value or weight, in fact fair representation has been the true, if unstated, basis for these decisions.

Chief Justice Warren acknowledged this obliquely in *Reynolds*. Justice Stewart was more direct.

> Representative government is a process of accommodating group interests through democratic institutional arrangements. Its function is to channel the numerous opinions, interests, and abilities of the people of a State into the making of the State's public policy. Appropriate legislative apportionment, therefore, should ideally be designed to insure effective representation in the State's legislature, in cooperation with other organs of political power, of the various groups and interests making up the electorate.

Reynolds v. Sims, 377 U.S. 533, 749 (STEWART, J., dissenting) Fair representation was reaffirmed by this Court as the fundamental aim of apportionment. *Gaffney v. Cummings,* 412 U.S. 735, 778 citing Chief Justice Warren in *Reynolds*. Recently, this Court once again made it clear that fair representation is the fundamental constitutional command.

> Thus, *Reynolds v. Sims* contemplated that "one person, one vote" would be only one among several neutral factors that serve the constitutional mandate of fair and effective representation. (Citation omitted). It was not itself to be the only goal of redistricting.

Davis v. Bandemer, __U.S.__106 S.Ct.2797, 2829 (POWELL, J. and STEVENS, J., concurring).

This circuitous recognition of fair representation as the essential constitutional guarantee can be (and could have been) reached directly. Logically, one should begin

by selecting an explicit apportionment goal and then proceed to define or evaluate implementation means.

> We must now cease to speak of equality in the singular and proceed to deal with equalities in the plural. . . .and the discourse on equality must bring us to reply to a precise question: what is the specific equality which has precedence in a democracy?
>
> G. Sartori, "Democratic Theory", p. 334, Wayne University Press, 1962.

Justice Frankfurter agreed that choices should precede implementation. "One cannot speak of "debasement" or "dilution" of the value of a vote until there is first defined a standard of reference as to what a vote should be worth". *Baker v. Carr,* 369 U.S. 186, 300 (1962) (FRANKFURTER, J., dissenting). Since ours is an electoral, representative democracy, the choice, in its simplest formulation, is between "electoral" and "representative" as the operative adjective. To equalize the "electoral" aspect of our democracy one has two choices: a direct voter referendum system without representatives, or a representative system in which all representatives are elected at large. Although seemingly democratic, such systems create a winner-take-all domination by the majority with no opportunity for protection of the interests of racial, ethnic, political or other minority group interests. In such circumstances nothing is equalized beyond the opportunity of each citizen to cast the same vote as every other citizen. The value or weight of a citizen's vote, if there be such a thing, is not equalized. This is so because elections are decided by groups of votes not by individual votes and, as a consequence, an individual's vote has no meaning except as it exists in combination with other votes. For example, in the borough of Brooklyn (Kings

County) enrolled Democrats outnumber all other political party enrollments combined by about six to one. In borough-wide elections, nomination by the Democratic Party is the equivalent of election. A Republican does not have the same weight or value of vote as a Democrat simply because each is entitled to cast a single ballot.

By concentrating on the representative aspect of our democracy and dividing a constitutency into districts, it becomes more feasible to achieve a more balanced protection of majority and minority group interests. A transition to represented sub-units brings with it a new set of problems regarding how unit boundaries and sizes are determined. But more importantly, it bifurcates a citizen's perspective as to which equality issue is paramount. Within a district, a citizen is most concerned with his ability to elect his preferred candidate as district representative. Within an entire governmental entity, a citizen is most concerned with the ability of his representative to compete with other district representatives.

Equality of a citizen's representation or vote value cannot be a fundamental parameter of constitutional interest in apportionment plans. There is, to begin with, no constitutionally mandated quantum of required citizen representation or vote value. In New York City, councilmanic districts comprise about 200,000 citizens, while in Albany about 6,400 citizens. Yet, no citizen of New York City could (or would) complain even though his vote is "debased" or "diluted" compared to that of a citizen of Albany. Likewise, if there were no Board of Estimate, no Brooklynite could complain that his vote is worth less than that of a Staten Islander in the election of his borough president, or in the alternative demand to have six borough presidents. A constitutional issue arises only when *representatives* compete in a common arena, i.e., sit on the same governmental body. Conversely, if in a single-member apportionment plan some members are arbitrarily allocated a greater vote weight, or if district lines are ger-

rymandered, even arithmetically perfect *Reynolds* or *Abate* apportionment will not save the plan.

Logic demands that the fundamental constitutional apportionment issue be one arising from the coming into being of a governmental body and one which if satisfied is immune from attack, i.e., be both a necessary and a sufficient condition. Fair district (borough) representation is the one parameter that fits this definition.

Of the various mathematical methods advanced to promote fair district representation for districts of unequal populations, only one has gained acceptance in the Courts, viz., district voting power. It is suggested that this method is the most appropriate for application to the Board of Estimate. The method was first developed employing the theory of games. Shapeley and Shubik, "A Method for Evaluating the Distribution of Power in a Committee System", 48 Am.Pol.Sci.Rev. 787 and first applied to the Board of Estimate in 1965, Krislov, "The Power Index, Reapportionment and the Principle of One Man, One Vote", 1965 M.U.L.L.37. Its most visible exponent in apportionment cases has been John Banzhaf III. Banzhaf, "Weighted Voting Doesn't Work: A Mathematical Analysis", 19 Rutgers L.R. 317, "Multimember Electoral Districts—Do They Violate the "One Man, One Vote" Principle", 75 Yale L.J. 1309. It is the method used to apportion 24 of New York State's county governments and the method Appellant Ponterio suggests is most appropriate for evaluating the apportionment of the Board of Estimate in this case. It is perhaps even more appropriate for the Board than for legislatures since the Board, unlike a legislature, functions only by voting. The Board has no committees. It enacts no laws. To the extent that its members provide constituent service, they do so not as Board members but in their underlying

roles as mayor, comptroller, council president and borough presidents.

This case presents this Court with an appropriate vehicle for clarifying unsettled apportionment issues and resolving lingering ambiguities. It is certainly a case of sufficient importance to warrant a comprehensive revue of the post-*Reynolds* evolvement of apportionment law and even a change of direction or emphasis. Since the Board is a specially tailored and limited-function body of local government, a decision of this Court departing from rigid adherence to ambiguous Equal Protection Clause principles and an acceptance of Due Process Clause principles of fair representation in the limited context of this case need not impact universally on the existing body of apportionment law.

POINT I

THE BOARD OF ESTIMATE PROVIDES A CONSTITUTIONALLY ACCEPTABLE INSTRUMENT OF LOCAL GOVERNMENT

On remand to the District Court after the first appeal in this action, the Second Circuit demonstrated the confusion that still surrounds apportionment law. On one hand it recognized the importance of fair borough representation. "Whether the present allocation of seats on the Board is a constitutionally permissible way of blending majority control with minority representation and other legitimate needs of local government is one issue to be examined on remand." (A204). But on the other hand, it dismissed Appellant Ponterio's argument that *Abate*-style apportionment of the Board would effectively disenfranchise Staten Island "the fact that a minority may regularly be overshadowed by its more populous neighbors under a proportional voting scheme is one characteristic of a representative democracy" (A204). The Second Circuit

thus continued to promote slavish adherence to apportionment by rote with a methodology that is blind to its consequences. Such a cavalier approach to the most fundamental of citizen rights cannot be allowed to stand.

The existence of fair brough representation on the Board as it now exists can easily be shown using the same district voting power methodology approved in *Frankin, League,* and *Greenwald.*[3,4] As already noted, district voting power is automatically equalized in all single-member, equal-population-district plans and in multi-member-district plans when members are apportioned by equalizing a population-per-member ratio among all districts. If there are a total of N members, each member holds a 1/N share of the total voting power. This equalizes district voting power since each member has the opportunity to vote independently of all other members (if a district has 5% of the total population and there are 100 members, that district will be allocated 5 members, i.e., 5% of the members, who in the aggregate have 5/100 or 5% of the total voting power).

3. The objective of district voting power apportionment is to give each constituent district (town, borough, etc.) a mathematical probability of affecting board vote outcomes proportional to its relative population. For example, if district A has 10% of the total population, its representative should have 10% of all decisive votes. "Decisive" means that if a town's vote is changed, the vote outcome of the board (e.g., achievement of a majority) is changed. By contrast, ordinary representational apportionment would allocate 10% of the number of representatives (or votes) to town A, without regard to the resulting ability of towns to affect vote outcomes.

4. This concept is commonly referred to as weighted voting since it is usually implemented using weighted votes rather than multiple members to preserve the effectiveness derived from the small size of such boards. Nevertheless, the operative feature of this concept is that it equalizes district voting power, not representation. Use of weighted votes is incidental.

If weighted votes are used instead of multiple members, equalization of district voting power is not as easily implemented. This is so because weighted votes are always voted as a bloc. For example, with 5 district members there are 2^5 or 32 possible vote combinations, but with a single member holding 5 votes, there are only 2 possible vote combinations (5 votes "yes" or 5 votes "no"). As a consequence, implementation of district voting power with weighted votes follows a trial-and-error procedure in which various combinations of vote weight allocations are tried until one is found which adequately apportions voting power in accordance with population. If it is required to synthesize a plan, it may be necessary to try many combinations; an arduous task that is substantially simplified by use of computers. No closed-form analytic solution has yet been developed for this task.

It should be emphasized that computers do no more than basic arithmetic and record-keeping. By contrast, analysis of an existing plan is much less arduous. Analysis requires nothing more complex than high-school algebra. No computers or computer experts are required. The computations involve only paper, pencil, and the knowledge of a reasonably bright high-school junior. The entire computation applicable to a simple majority vote of the full Board is given in Exhibit A of Appellant Ponterio's Jurisdictional Statement.[5]

The computations for every enabling vote combination of the full Board except the trivial unanimous vote combination (simple majority, 2/3 majority, 3/4 majority) and the mayorless Board (simple majority, 2/3 majority) were presented by Appellant Ponterio to the Courts below.

5. The formula appearing on page 23 of the Jurisdictional Statement contains a typographical error. The correct formula is $\frac{n!}{r!\,(n-r)!}$.

Appellant Ponterio agrees that the voting power apportionment on the Board could be made more mathematically perfect if all other factors were ignored. But all other factors should not be ignored. Apportionment is an art not a science. It involves people not just numbers. And much to the chagrin of mathematicians, people do not think or behave in accordance with tidy formulas. One plan cannot be said to be better than another solely because its deviation percentage is less. Furthermore, a substantial number of legitimate state interests have been shown by appellants in this case to warrant deviation from mathematically perfect apportionment (JA 381-98). The question of whether the Board configuration must be altered does not arise at all unless a determination is first made that the existing configuration is constitutionally unacceptable. There is no dispute that actual voting power on the Board is as shown in the "Vote Power" columns of Tables 1 and 2. There is no dispute that if Board voting power were apportioned with mathematical perfection according to borough populations, voting power would be as shown in the columns headed "Norm Vote Power." The malapportionment issue boils down to this: must a venerable, admittedly effective body of local government be completely revamped or discarded for the sole purpose of shifting 5 or 6% voting power from Staten Island to Brooklyn? We submit that the answer is no.

TABLE 1

VOTING POWER ANALYSIS
BOARD OF ESTIMATE (FULL BOARD)

		SIMPLE MAJORITY			2/3 MAJORITY			3/4 MAJORITY		
MEMBER	NO. OF VOTES	NORM VOTE POWER	VOTE POWER	% DEVIATION	NORM VOTE POWER	VOTE POWER	% DEVIATION	NORM VOTE POWER	VOTE POWER	% DEVIATION
BROOKLYN	1	13.72	8.70	-5.02	14.34	9.09	-5.25	14.80	9.38	-5.42
QUEENS	1	11.63	8.70	-2.93	12.16	9.09	-3.07	12.55	9.38	-3.17
MANHATTAN	1	8.78	8.70	-0.08	9.18	9.09	-0.09	9.47	9.38	-0.09
BRONX	1	7.19	8.70	+1.51	7.51	9.09	+1.58	7.75	9.38	+1.63
STATEN IS.	1	2.17	8.70	+6.53	2.26	9.09	+6.83	2.34	9.38	+7.04
MAYOR	2	18.84	18.84	0	18.18	18.18	0	17.70	17.70	0
COMPTROLLER	2	18.84	18.84	0	18.18	18.18	0	17.70	17.70	0
COUNCIL PRES.	2	18.84	18.84	0	18.18	18.18	0	17.70	17.70	0
MAXIMUM DEVIATION:				11.55%			12.08%			12.46%

TABLE 2

VOTING POWER ANALYSIS
BOARD OF ESTIMATE (MAYORLESS BOARD)

		SIMPLE MAJORITY			2/3 MAJORITY		
MEMBER	NO. OF VOTES	NORM VOTE POWER	VOTE POWER	% DEVIATION	NORM VOTE POWER	VOTE POWER	% DEVIATION
BROOKLYN	1	16.99	10.77	-6.22	16.90	10.71	-6.19
QUEENS	1	14.40	10.77	-3.63	14.32	10.71	-3.61
MANHATTAN	1	10.87	10.77	-0.10	10.81	10.71	-0.10
BRONX	1	8.90	10.77	+1.87	8.85	10.71	+1.86
STATEN IS.	1	2.68	10.77	+8.09	2.67	10.71	+8.04
COMPTROLLER	2	23.08	23.08	0	23.21	23.21	0
COUNCIL PRES.	2	23.08	23.08	0	23.21	23.21	0
MAXIMUM DEVIATION:				14.31%			14.23%

The overlay of at-large and local votes ensures that no enabling vote of the Board can occur without the vote of at least one or a combination of members representing the entire city. Clearly, there is majority control of the Board. On the full Board, the at-large members hold a majority of votes (6 out of 11) and a majority of voting power (56.52%). On the mayorless Board, the five borough presidents hold a majority of votes (5 out of 9) and voting power (53.85%). Nevertheless, majority control is still assured as it is still true that an enabling vote cannot occur without the vote of at least one or a combination of members representing the entire city. In the case where a 5-vote majority is achieved by the votes of the borough presidents alone, it has been argued that this gives Staten Island an undeserved veto power. What seems to have been overlooked is that even if the five borough votes were allocated on a strict population-per-vote basis (Brooklyn 1.58, Queens 1.34, Manhattan 1.01, Bronx 0.83, Staten Island 0.25) the result would be unchanged. Staten Island's 0.25 vote would be just as necessary in achieving the 5-vote total as its 1 vote under the current vote allocation. This illustration points up the danger of analyzing only one of many possibilities. It is the strength of the district voting power method that it accounts for all possibilities.[6] Analyses, properly done, show that the Board provides an acceptable blend of majority control and borough participation, i.e., fair representation.

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6. The Mayor does not participate in votes to override a mayoral budget veto. There are then 2' or 128 possible vote outcomes. Either the Board or the City Council may initiate a veto override. Override requires a ⅔ majority of the initiating body plus simple majority vote of the other body. Therefore, a 5-vote board majority is effective only when there has already been a ⅔ majority vote in the Council.

POINT II

THE DECISION OF THE COURT OF APPEALS TO ELIMINATE AT-LARGE MEMBERS FROM THE ANALYSIS WAS ARBITRARY AND WILL UNDERMINE THE IMPLEMENTATION OF INNOVATIVE FORMS OF LOCAL GOVERNMENT.

The Board of Estimate is the most powerful local governmental body of the most important city in the nation. Its composition and voting procedures are unique. Together with the City Council, it comprises the country's only bicameral municipal government. It is the paramount example of the kind of innovation the Supreme Court has recognized as essential.

> "[v]iable local governments may need many innovations, numerous combinations of old and new devices, [and] great flexibility in municipal arrangements to meet changing urban conditions," *Sailors v. Board of Education*, 387 U.S. 105, 110-11 (1967). "The Constitution does not require that a uniform straitjacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems." *Avery v. Midland County*, 390 U.S. 474, 485 (1968).

Innovative forms of government also need innovative scrutiny to assess their compliance with constitutional guarantees.The response of the courts below has been to strip the Board of all its salient features until a residue is left that can be analyzed by *Abate* methodology. If square pegs are repeatedly forced into round holes, sooner or later all pegs will be round.

The Court below cited two reasons for adopting the unmodified *Abate* method. First, it agreed with the District Court that the method has been used to analyze malapportionment in other cases involving a combination of at-large and local representatives. Second, it concluded,

on the basis of pure conjecture as to factual matters, that the Board is two tiered; one tier composed of 3 at-large members and a second tier composed of 5 local members, and that each tier must be analyzed separately.

In none of the cases relied upon by the courts below was analysis methodology in issue and in none of those cases would the conclusion have been materially affected by inclusion of at-large members in the analysis. A case-by-case analysis is presented in the Brief of Intervenor-Defendant-Appellant Ponterio on appeal to the Second Circuit Court of Appeals at pp. 13-16. Particularly noteworthy is the courts' reliance on *Avery*. Not only was there no issue raised therein as to choice of methodology, there was no analysis whatever. The sole issue was whether a unit of local government is subject to the one-person, one-vote principle in the first instance. The defendants in *Avery* made no claim that their apportionment plan met any constitutional test. In fact, they testified that population was not an apportionment criterion. Moreover, the courts below ignored altogether those cases in which at-large (floterial) members *were* included in apportionment analyses. *Davis v. Mann*, 377 U.S. 678 (1964); *Kilgarlin v. Hill*, 386 U.S. 120 (1967); *Mahan v. Howell*, 410 U.S. 315 (1972); *Kilgarlin v. Martin*, 252 F.Supp. 404 (S.D. Texas 1966); *Cosner v. Dalton*, 572 F.Supp. 350 (E.D. Va. 1981); *Boyer v. Gardner*, 540 F.Supp. 624 (D.N.H. 1982), and those Courts' own decisions, *Andrews v. Koch*, 528 F.Supp. 246 (E.D.N.Y. 1981) *summ. aff'd* 688 F.2d 815 (2d Cir. 1982), *aff'd sub nom. Giacobbe v. Andrews*, 459 U.S. 801 (1982).

There can be little doubt that the courts below hypothesized a two-tiered Board simply to avoid the slightly more complex task of assessing the Board as it undeniably exists—an inseparable 8-member body (A183

at n.16). Moreover, the Courts below totally ignored the only competent factual testimony with regard to Board operation, the affidavits of Mayor Koch and Borough President Lamberti, which explicitly refute the Court's hypothesized existence of a two-tiered Board and parochial attitudes of Board members (JA 506, 514). Mathematical uncertainty has been repeatedly used as the favorite excuse for not grappling with innovative apportionment plans. We were initially led to expect otherwise:

> "We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath of office requires no less of us." *Reynolds,* 377 U.S. at 566.

Nevertheless, this court backed away from that pledge 9 years later in its famous footnote, "We decline to enter this imbroglio of mathematical manipulation," *Mahan v. Howell,* 410 U.S. 315, 319, n. 6. In truth, the imbroglio in *Mahan* had nothing to do with mathematical manipulation. The note referred to a dispute as to whether floterial districts should be analyzed by the aggregate or shared-floater methods. The choice of method involves political science not mathematics. For example, the aggregate method might be appropriate where constituent districts have common interests or needs and the at-large (floater) representative represents his constituents as a unitary group without regard to their district of residence. The shared-floater method might be appropriate where constituent districts have diverse or conflicting interests, as where they have been combined for numerical convenience only. In such a case, an at-large representative may balance his representation in proportion to each district's population. Once a method is selected, there is no dispute whatever over the appropriate mathematical calculation. In short, the only factor *not* involved in the "imbroglio" is the "mathematical manipulation."

The Court's desire to restrict apportionment mathematics to sixth-grade arithmetic is no excuse for demolishing the Board of Estimate. District voting power is a court-approved basis for Board apportionment that accounts for every salient feature of the Board's composition and voting rules. It shows the Board to be constitutionally configured.

POINT III

THE DECISION OF THE COURT OF APPEALS CONTRADICTS PRIOR DECISIONS OF THE SUPREME COURT, THE COURT OF APPEALS, AND THE NEW YORK COURT OF APPEALS.

District voting power apportionment of county boards of supervisors in New York State is a fact of life and has been for over two decades. Use of this method has been approved explicitly by the State courts, *Franklin* and *Iannucci, supra,* and by the Second Circuit Court of Appeals, *League* and *Greenwald, supra.* By dismissing the appeal in *Franklin* for want of a substantial federal question, the Supreme Court has implicitly approved this apportionment basis.

Where district voting power is implemented with weighted votes, smaller districts must be given a greater vote weight than would be indicated by population-per-vote ratios. For example in the Nassau County case examined in *League*, the smallest town, Glen Cove, was allocated three times the number of votes indicated by a population-per-vote ratio.[7]

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7. Glen Cove had a population of 24,618 or 1.86% of the total county population of 1,321,582. By *Abate* standards, it should have been allocated 1.8% of the total of 108 board votes (i.e., 2 votes). Instead it was allocated 6 votes so that its voting power would be commensurate with its population.

Following plaintiffs' admission that district voting power apportionment is an acceptable method for applying constitutional one-person, one-vote principles to the Board of Estimate, appellant Ponterio presented appropriate computations to the District Court, and subsequently to the Court of Appeals, that account for the presence of the three at-large members as well as the five borough members. Neither court commented on these computations in its decision. Nor did either court reconcile its disapproval of Board apportionment with the Second Circuit's approval of the Nassau County Board in *League* whose malapportionment by *Abate* standards exceeds that of the Board of Estimate.[8] The city defendants presented no methodology argument in the District Court. On the second appeal they suggested a different voting power method, viz., citizen voting power (also termed the "Banzhaf index"). Citizen voting power purports to measure the power of a citizen to affect board vote outcomes, acting through his representative. It is calculated by multiplying his district's voting power by his power to elect board representatives. The first component is identical to district voting power described above. Appellant Ponterio does not favor this method because its second component relies upon many unrealistic assumptions and an essential ingredient has been rejected by the Supreme Court. *Whitcomb,* 403 U.S. at 145-46. A citizen's vote power is defined as the probability of his breaking a tie vote. A bit of simple arithmetic is enough to demonstrate the absence of realism in this method. Using the most favorable assumptions (a two-candidate contest, equal

8. The maximum deviation of the board approved in *League* is 5.26% if analyzed in terms of voting power but is 85.58% if analyzed by the *Abate* (population-per-vote ratio) method. Corresponding deviations for the Board of Estimate are 11.55% and 77.95%. (Brief of Intervenor-Defendant-Appellant Ponterio on appeal to the Second Circuit Court of Appeals at p. 18 and Ponterio's Reply Brief at p. 10.

probability of every outcome, 2.2 million registered voters) a tie vote can be expected to occur once in every 2.2 million elections or once every 8.8 million years! The method is also conceptually flawed. It credits a win to the last vote cast in much the same way as baseball statistics denote the 4th run in a 4-3 final score as *the* winning run. Obviously all 4 runs contribute equally to the win even though the last one may evoke a greater emotional response. Using the same analogy, the district voting power method treats each vote in a 6-5 split as decisive, i.e., each of the 6 votes is a winning vote. Finally, the citizen vote power method assumes that a representative votes the way the citizens who elected him want him to vote. Of course in a secret-ballot election, a candidate has no way of knowing who voted for him, and there is no basis for an assumption that a representative represents only those citizens of his own political party or any other probable constituency (indeed, following an election a winning candidate typically cannot find anyone who voted against him, or at least anyone who will admit it). Under any circumstances, given that the Board votes about 7000 times a year it is absurd to suggest that there is a single constituency that feels the same about all 7000 matters.

The Court of Appeals rejected the citizen voting power method. But it did so for the wrong reason, and in the process contradicted its own acceptance of the *district* voting power method in *League* and *Greenwald,* as well as the Supreme Court's acceptance of that method in *Franklin.* The Court finds "seriously defective" the method's assumptions of the "same weight . . . and same probability of occurrence for each of the 552 possible voting combinations in which a single Board member can

determine outcome" (A27).[9] This very premise underlies the district voting power analysis approved in *Franklin*, *League*, and *Greenwald*. *League*, 737 F. 2d at 168-69. Indeed it underlies every apportionment method.[10] It is not clear whether the Court understood that, in rejecting this component of the *citizen* voting power method, it was also rejecting the *district* voting power method altogether. The Court may have been misled by the city defendants' brief in which the two methods were confused and inaccurately described.

The Court of Appeals continues its contradiction of prior decisions by stating that "voter power over outcome is irrelevant to equal protection analysis" (A44) and that the equal protection clause protects "the equalization of voter representation, not interest representation" (A34). Obviously, both *Franklin* and *League* acknowledge the protection of interests (i.e., of towns, not of citizens) by equalizing the voting power that towns have over board

9. Among other things, the Court confuses voting combinations with decisive votes. Obviously, for an 8-member board, there are 2^8 or 256 possible voting combinations. In 168 of them (for a simple majority of 6 votes out of 11 votes) one or more members holds a decisive vote. The total number of decisive votes for all members in all these 168 combinations is 552.

10. Equal probability of voting combinations is at the heart of every apportionment scheme. It is assumed that by giving each citizen one vote his opportunity to elect a representative is the same as that of every other citizen. That assumption rests upon an equal probability premise and it matters not if actual election results support the premise (unless due to an invidious plan). By the same reasoning, equal allocation of legislators to equal groups of citizens is assumed to give each group equal vote power in the legislature. In practice such assumptions are never valid because of bloc or reciprocal voting at both the citizen level and the legislator level. This does not render invalid apportionment plans founded on such assumptions. The best any apportionment plan can hope to equalize is opportunity, not results.

vote outcomes. Furthermore, this Court has acknowledged the importance of group or interest representation in its gerry mander decisions. *Davis, supra, accord, Thornburg v. Gingles*, __U.S.__, 106 S. Ct. 2752 (1986).

POINT IV

THE COURT OF APPEALS ERRED IN AFFIRMING A DECISION ON A SUMMARY JUDGMENT MOTION WHEN CONTESTED ISSUES OF MATERIAL FACT WERE PRESENTED.

On remand after the first appeal of this action the District Court held a scheduling conference in which it was agreed that defendants, having the burden of proof, would submit briefs on methodology issues and plaintiffs would respond. Rather than respond to defendants' briefs, plaintiffs moved for summary judgment asserting the applicability of unmodified *Abate* analyses. Before responses to plaintiffs' motion were completed, a pre-trial status conference was ordered for February 1, 1984. At that conference, Judge Neaher stated that he was considering ordering a trial or hearing so that a complete record on methodology issues could be made. No trial or hearing was held. Instead, in August 1984 he issued a Memorandum and Order adopting the unmodified *Abate* method, without notice and without providing any opportunity for factual or other testimony. His choice of methodology was based on an observation that since there is a single tier of borough representatives on the Board, viz., the five Borough Presidents, *Abate*-method percent deviations should be calculated among those five members alone (A149). Judge Neaher decided that the Second Circuit was mistaken in believing that the Board's design raises novel apportionment issues (A136) and ruled out consideration of any method that takes into account the presence on the Board of the 3 at-large members (A179 at n. 8).

The Court of Appeals premised its selection of the unmodified *Abate* method on findings of fact that are not supported by a single word of testimony or other competent evidence in the record, i.e., that "citywide Board members and borough presidents represent different interests" (A30); that "borough presidents sit on the Board of Estimate as representatives of the special concerns their constituents have *qua* residents of a particular borough" (A32); and that "City-wide members. . . .must be supposed. . . .to represent. . . .the interests of their constituents *qua* residents of New York City" (A32). The only competent evidence in the record is precisely to the contrary. In the justification phase of these proceedings Mayor Edward I. Koch submitted an affidavit in which he specifically denies the existence of a two-tiered Board (JA 506). Borough President Ralph J. Lamberti submitted an affidavit in which he states; "Board members, regardless of the size of their constituencies, act upon local issues, as well as issues of citywide concern" (citing examples) (JA 514).

No citizens testified. Apart from the Koch and Lamberti affidavits, no board members testified. The Court below offers no clue as to how it was able to divine what is in the minds of board members and citizens. It doesn't state whether its determination applies to all citizens or some citizens, to all board members or some board members. This speculative determination is the crux of the Court's decision. Only by assuming the Board to be two-tiered is the Court able to support its selection of the unmodified *Abate* methodology and the resultant malapportionment percentage.

It is well settled that the function of a court of appeals as well as a trial court on a motion for summary judgment is merely to determine whether triable issues of material

fact exist, not to try such issues, *Empire Electronics Co. v. United States,* 311 F.2d 175, 179 (2d Cir. 1975), *Continental Casualty Co. v. City of Richmond,* 708 F. 2d 1483, 1487 (9th Cir. 1985); particularly where the facts are gleaned only from affidavits, *Jaroslawicz v. Seedman,* 528 F. 2d 727, 731 (2d Cir. 1975); and involve questions of intent or a subjective state of mind. *Washington Post Co. v. Keogh,* 365 F. 2d 965, 967, *aff'd* 125 U.S. App. D.C. 32, *cert. denied* 385 U.S. 1011, *International Longshoremen's Association, AFL-CIO v. Delta Steamship Lines, Inc.,* 832 F.2d 759 (2d Cir. 1987)., see *Friedman v. Meyers,* 482 F. 2d 435, 438-39 (2d Cir. 1973). Moreover, where the Court is confronted with a choice of inferences to be drawn from underlying facts in affidavits and exhibits, the inferences "must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962). The Court of Appeals erred in trying a factual issue raised *sua sponte* with "facts" the Court itself invented notwithstanding the presence in the record of affidavits contradicting the Court's inferred "facts."

CONCLUSION

Based upon principles of fair representation and the analyses presented by Appellant Ponterio, this Court should find that the Board of Estimate as it now exists is constitutionally apportioned. This Court should also find that the Court below erred in deciding a motion for summary judgment when contested issues of material fact were presented. Whether on substantive or procedural grounds, the decision of the Second Circuit Court of Appeals should be reversed.

June 10, 1988

Respectfully submitted,

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Nos. 87-1022, 87-1112

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE BOARD OF ESTIMATE, *et al.*,

Appellants,

v.

BEVERLY MORRIS, *et al.*,

Appellees.

FRANK V. PONTERIO,

Appellant,

v.

BEVERLY MORRIS, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR MUNICIPAL APPELLANTS AND APPELLANT STRANIERE

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QUESTIONS PRESENTED

This is an appeal from a final judgment holding that the equal protection clause cannot accommodate a governing body in New York City which, for nearly a century, has achieved a balance of regional and local interests essential to the effective democratic governance of our Nation's largest city.

Through the New York City Board of Estimate, New York State has successfully accommodated the need for regional planning and delivery of services and the equally important need for local control of decisions which have a peculiarly local impact. Outside observers have called the Board an "institutional miracle" for forming consensus among the City's many diverse interests. On the Board sit three city-wide elected officials who (with two votes each) control the majority of votes and the presidents of the City's five constituent boroughs (who cast one vote each). In declaring the Board's structure unconstitutional, the courts below held that they could not consider either the existence on the Board of the three city-wide officials or the fact that they controlled the majority of votes on the Board. Their holdings were based on the population disparities among the five boroughs and were without regard to the effect of the city-wide officials or the important policies which underlay the Board's design.

The questions presented are these:

1. Does the equal protection clause prohibit a state from delegating essentially non-legislative local powers to a regional board consisting of a) elected representatives from formerly independent political units of unequal population who cast a minority of the Board's votes, and b) representatives of the consolidated regional unit, elected at-large from the entire regional unit, who cast a majority of the Board's votes?

2. Does the equal protection clause require a court, in determining whether the Board's voting structure comports with the principle of one person, one vote, wholly to disregard the representation afforded the voters of all boroughs by the at-large members?

3. Were the courts below correct in finding a sub-state government unconstitutional merely because there are hypothetical alternative structures which could achieve stricter voter equality without regard to the fact that the alternative structures submerge substantial state interests?

PARTIES

Appellees, plaintiffs below, are three registered voters in the City of New York who reside in the County of Kings, better known as Brooklyn.

Appellants are the City of New York, a municipal corporation in the State of New York; the New York City Board of Estimate, a governing body comprised of eight elected officials which operates pursuant to sections 61 and 62 of the New York City Charter; and the eight members of the Board of Estimate. The eight members of the Board are Edward I. Koch, the Mayor of New York City; Andrew J. Stein, the President of the New York City Council; Harrison J. Goldin, the Comptroller of the City of New York; Howard Golden, the President of the Borough of Brooklyn; Fernando Ferrer, the President of the Borough of the Bronx; David N. Dinkins, the President of the Borough of Manhattan; Claire Shulman, the President of the Borough of Queens; and Ralph J. Lamberti, the President of the Borough of Staten Island.

Also an appellant here is Robert Straniere, a member of the New York State Assembly who intervened as a defendant below and who joins this brief.

Frank Ponterio, a resident of Staten Island who intervened as a defendant below, is also an appellant but does not join this brief.

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR MUNICIPAL APPELLANTS AND APPELLANT STRANIERE

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit, dated October 8, 1987, is reported at 831 F.2d 384 and appears in the Appendix to the Jurisdictional Statement at page 5.

The decisions of the United States District Court for the Eastern District of New York, dated August 21, 1984 and November 19, 1986, are reproduced in the Appendix to the Jurisdictional Statement at page 119 and page 55 and are reported at 592 F. Supp. 1462 and 647 F. Supp. 1463.

The District Court's rulings came upon remand from an earlier decision of the Court of Appeals for the Second Circuit (May 16, 1983), which held that the New York City Board of Estimate is subject to the one person, one vote principle. This decision, which reversed the initial judgment entered by the District Court,

appears at page 186 of the Appendix to the Jurisdictional Statement and is reported at 707 F.2d 686.

The first decision of the United States District Court for the Eastern District of New York, dated December 1, 1982, appears at page 208 of the Appendix and is reported at 551 F. Supp. 652.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on October 8, 1987. A Notice of Appeal to this Court on behalf of the municipal appellants was timely served on the parties and filed in the Court of Appeals on October 15, 1987. Intervenor Robert Straniere served and filed a timely Notice of Appeal on November 6, 1987. Intervenor Frank Ponterio served and filed a Notice of Appeal on or about December 15, 1987. Municipal appellants and intervenor-appellant Straniere filed their joint Jurisdictional Statement on December 17, 1987 and intervenor-appellant Ponterio filed his Jurisdictional Statement on December 31, 1987. This Court noted probable jurisdiction on April 4, 1988 and consolidated the appeals.

The jurisdiction of this Court rests upon 28 U.S.C. § 1254(2) in that the Court of Appeals held a state statute to be repugnant to the United States Constitution.

RELEVANT CONSTITUTIONAL PROVISION AND STATE STATUTES

The Fourteenth Amendment to the United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The New York City Charter:

> Section 61: Membership. The mayor, the comptroller, the president of the council, and the presidents of the boroughs shall constitute the board of estimate.
>
> Section 62: Voting in the board.
>
> a. As members of the board of estimate, the mayor, the comptroller and the president of the council shall each be entitled to cast two votes, and the president of each borough shall be entitled to cast one vote.
>
> b. Except as otherwise provided in this charter or by law, the board shall act by resolution adopted by a majority of the whole number of votes authorized to be cast by all the members of the board.
>
> c. No resolution or amendment of any resolution shall be passed at the same meeting of the board at which it is originally presented unless by a three-fourths vote or shall be finally passed except at a meeting open to the public. Prior to a final vote by the board on any resolution or amendment of any resolution members of the general public shall be afforded the opportunity to be heard on such resolution or amendment.
>
> d. A quorum of the board shall consist of a sufficient number of members thereof to cast six votes, including at least two of the members authorized to cast two votes each.

STATEMENT

Introduction

Almost ninety years ago, independent political units in the southeastern part of New York State joined to form what was then, and is now, the largest municipal corporation in the United States. The challenge of that consolidation was, and remains ninety years later, how to accommodate the needs of the local units and the needs of the larger consolidated region. For almost ninety years, the Board of Estimate has been the primary governmental body chosen by New York State to harmonize these sometimes conflicting interests. The Court of Appeals found that this

choice was illegitimate. The Court's finding of unconstitutionality, we submit, was based on an insufficient appreciation of the history, structure and function of the Board and of its role in the development of New York City.

The City of New York

New York City's population of over seven million people is more than twice that of any other American city and greater than all but nine states (JA487, 491).[1] The City's 315 square miles (more than Baltimore, Boston, Minneapolis, San Francisco and Washington, D.C. combined) is one of the largest municipalities in the world. Its population density is the highest of any city in the country. The diversity of that population—the different races, ethnic groups, languages, religions, political groups—is unique. The City has the largest systems in the country for education, health care, welfare, police and fire, sanitation, parks, and housing. The City's annual budget exceeds that of 48 of the 50 states—and many of the world's nations (JA491).

New York is not just an unusually large and diverse city; it is a regional government that delivers more services than any other entity of its kind. Other large cities (such as the next two largest, Los Angeles and Chicago) are themselves parts of larger counties that provide basic services. New York absorbs five counties and assumes more than the sum of the usual functions which counties and lesser political subdivisions elsewhere perform, such as welfare, education, housing and health care. The result is that one central government —administered by a mayor vested with great power—is charged with the delivery of services to and allocation of resources among a large and diverse region.

More than fifty years ago, Walter Lippman described the difficulties of governing New York City (JA73):

> The city is much too big to be governed as a single centralized unit. It is also too varied in its population and its occupations. It is also too old in the traditions of local independence. On the other hand, of course, the interests of the people in all the boroughs are much too closely related not to be dealt with under city-wide and coordinated policies.

1. References to the Appendix to the Jurisdictional Statement will be preceded by the letter "A". Numbers preceded by the letters "JA" refer to pages of the Joint Appendix.

The resolution of this tension—between a need to create fair and efficient systems for the delivery of services and an equally weighty need to assure local autonomy—has been the central challenge of New York City's government since the formation of the Greater City of New York in 1898. The Board of Estimate is the way in which New York has chosen to resolve the tension. It is a unique response to the history, geography, culture and demographics of the city—just as the different governing structures of other localities are specific responses to their histories and needs.

The most important reason for the Board's success, and what makes it unusual, is the presence on the Board of borough representatives and the way in which their minority votes are blended with the majority votes of the city-wide representatives. The presence of borough representatives is not accidental. It is a response to the same factors of history, geography, and the like, which made the Board itself necessary. The boroughs were obvious choices as local units within the regional government. They were (and are) large enough to check the central authority, yet small enough to allow for meaningful expression of local interests.

The Boroughs of New York

New York's five boroughs are, for the most part, creatures of nature: two of them (Manhattan and Staten Island) are surrounded by water; a third (the Bronx) is a peninsula jutting out from the mainland; the other two (Brooklyn and Queens) form part of an island and are divided by the nineteenth-century boundary of the one-time City of Brooklyn. Four of the five boroughs would themselves rank among the ten largest cities in the United States: Brooklyn (with approximately 2.2. million people); Queens (1.9 million); Manhattan (1.4 million); and the

Bronx (1.1 million). The fifth, Staten Island, with more than 350,000 people, roughly equals the population of Cincinnati, Oakland, Tucson, or Minneapolis.

Although they now share a common government, the boroughs have distinct histories, demographics, topographies, and social and economic characteristics. Manhattan is among the financial and cultural capitals of the world; the Bronx is a reviving borough that contains some of the poorest communities in the nation. The least populous of the boroughs, Staten Island, has the greatest amount of undeveloped tracts of land and the second largest inventory of city property (more than Manhattan and Queens combined). Of the most heavily populated boroughs, Queens is known for its stable neighborhoods of one and two-family homes; Brooklyn has an unrivaled cultural diversity.

Upon consolidation of the City of New York, the boroughs became the principal unit of local government. 1896 N.Y. Laws ch. 488, § 1. In the years thereafter, the State effected a slow transition of powers from the boroughs to the City. Until 1962, when the State transferred their remaining powers to the City, the boroughs retained substantial autonomy over local services like streets, sewers and sidewalks (JA63, 72-73). Despite the pooling of powers, the boroughs remain the principal units within the City for the delivery of state and municipal services, for the organization of government and political institutions, and for the expression of local views. The borough governments, headed by an elected president, act as advocates for the boroughs on government services and as conduits between the City and the local communities within each borough.

The City's governmental and political institutions are organized to facilitate this role. The City's essential municipal services—such as its police, fire and sanitation departments— operate within borough units. Major city agencies—on housing, welfare, health care, planning, —maintain offices in each borough. The judicial system—from prosecutors, legal aid, public administrators, and sheriffs to the criminal, civil, family and surrogate's

courts—is organized by borough. So, too, are the political parties, which function exclusively at the borough level; no city-wide Democratic or Republican Party exists in New York. Legislative districts within the City (congressional, state, and city) are drawn to follow borough lines as closely as possible. By law, the City's local school districts cannot cross borough lines (N.Y. Educ. L. 2590-b[2][b] [McKinney 1981]); and each borough has its own college or community college, or both. State law also requires that many of the principal boards and commissions in city government base their membership at least in part on equal borough representation.[2]

The 59 community boards throughout the city are likewise fashioned along borough lines. These boards give advice to city agencies and to the Board of Estimate on local matters. The borough president, partly in concert with the city council members from the borough, appoints the boards to represent community districts drawn within borough boundaries. The boards hold public hearings on budget, municipal service and land use matters, propose community priorities, and prepare requests for city

2. *See, e.g.*, N.Y. Educ. Law § 2590-b(1)(a) (McKinney 1981) (the City's 7-member Board of Education, responsible for the public elementary and secondary school system, must have one representative from each borough); *id.* 6204(2)(f) (McKinney 1985) (the 17-member board of trustees of the City University must have two representatives from each borough); N.Y. Elec. Law § 3-200(3) (McKinney 1978) (10-person City Board of Elections comprised of two representatives from each borough); N.Y. Gen. Mun. Law § 917(d) (McKinney 1986) (15-person City Industrial Development Agency must have one representative from each borough); N.Y. Public Authorities Law § 1204-A(2) (McKinney 1985) (15-member advisory council to the City Transit Authority must have one representative appointed by each borough president); N.Y. Real Property Tax Law § 489-bbb (McKinney 1984) (City Industrial and Commercial Incentive Board, in addition to its regular members, must have one representative from the borough with respect to which the Board is acting); N.Y.C. Charter § 192(a) (Williams Press 1986) (7-member City Planning Commission must have one representative from each borough); *see also* N.Y. Uncons. Laws § 7173(c) (McKinney 1979) (borough president may veto projects within borough proposed by Port Authority of New York and New Jersey.).

Under state law, the boroughs exist as counties: Brooklyn is Kings County, Manhattan is New York County, Staten Island is Richmond County; Queens and the Bronx retain their names.

expenditures. The leaders of these community boards in each borough also sit on the borough board, chaired by the borough president and composed as well of the city council members elected from that borough. The borough boards parallel the activities of the community boards from a borough perspective.

The Board of Estimate

The Board's History: The Board of Estimate's antecedents predate the current City of New York (JA59). In 1864, New York State created a Board of Estimate and Apportionment. Its mandate was to calculate the expenses to be incurred in operating a multi-community police force and to allocate those expenses among member communities that are today part of New York City (*Id.*) This new entity was composed of appointed representatives of the metropolitan police district and of the communities embraced by the district (JA59). This arrangement enabled separate political and geographic units to pool their resources to solve a common problem that crossed then-existing boundaries; it assured that regional needs received priority and yet protected the interests of the individual localities. So successful was this chemistry that, during the next three decades, with various changes in its composition, the Board assumed increasing responsibility over the public fisc (JA60, 61).

In 1898, upon a popular vote, three counties (New York, Kings and Richmond) and parts of three other counties, plus three cities, fifteen towns, parts of three other towns, and numerous individual villages and districts—each of them at the time discharging government functions over a geographic area—joined together to form the Greater City of New York. 1897 N.Y. Laws ch. 378, § 1; *see also* A. Green, *The Greater New York Charter* v (1897). The three existing counties plus amalgams of the other existing subdivisions became the five boroughs of New York. "To fuse the multifarious powers, duties and functions of the various Municipalities concerned, involving as they do the conveniences, the necessities, the nearest interest of 3,000,000 of people into a unit of governmental care and control was a task of no ordinary

magnitude." *Id.* at iv. The distinct characteristics of these communities, and the yearning for a government close to home, posed a formidable obstacle to consolidation. *Id.* at iv-vi. The 1901 Charter Revision Commission recognized that "the vast territory comprised within [New York City] . . . demands some subdivision and some degree of local autonomy" (JA408). To obtain cession of local control to a central government, to persuade people to forgo home rule for the greater good, required some assurance that a meaningful voice responsive to local concerns would be heard on matters having a peculiarly local impact.

The Board of Estimate became the vehicle for expressing that balance.

The Board's Powers: The Board of Estimate is not a legislature. New York City does not have a bicameral legislature. By law, the legislative power in the City resides in its City Council, whose thirty-five members are elected from districts drawn on the basis of population. New York City Charter §§ 21, 22 (Williams Press 1986) [hereinafter, "Ch."]. Enactments of the City Council become law upon approval of the mayor and only the mayor. *Id.* § 38. The Board of Estimate is not a part of that process. With one exception—its limited participation in the budget-making process—the Board has no say in any action the City Council takes. And, with that one exception, the Board cannot exert power of general applicability to all citizens of New York City.

The Board's major areas of responsibility are (1) to make final determinations on the use, development and improvement of land within the City; (2) to approve contracts for municipal services not subject to public bidding; (3) to grant franchises to operate city services or to use city land; (4) to approve the disposition of city-owned land; and (5) to participate in a limited way in the adoption of the City's capital and expense budgets.

By design, the issues over which the Board has exclusive jurisdiction (1-4 above) are highly local. The Board's power to manage city property (Ch. §§ 67[1],[4]; 384) is the power to decide to lease a city building on Webster Avenue in the Bronx to shelter the homeless, or on Christopher Street in Manhattan to care for

AIDS patients, or on East 16th Street in Brooklyn to house low-income families, or on Forest Avenue in Staten Island to supply foster care, or on Queens Boulevard to offer drug counseling. Its power to zone or dispose of land (Ch. §§ 200, 202) is the power to determine that a site on 161st Street in the Bronx ought to be a parking lot, or that a parcel on Yellowstone Boulevard in Queens is suitable for commercial use, or that a strip of waterfront land on Staten Island is suitable for a park, or that Columbus Circle in Manhattan may accommodate a high-rise building. The Board's power to grant contracts and franchises (Ch. §§ 342, 362-73) is the power to purchase day-care services on Lynch Street in Brooklyn, or to buy homemaker services on Effits Street in Staten Island, or to allow a sidewalk cafe in Greenwich Village in Manhattan, or to authorize an intraborough bus franchise along an avenue in Queens, or to provide "meals on wheels" at a Bronx senior citizens center.

None of these decisions affects all citizens of the City alike; each has a special impact on the quality of life in a particular community.

In addition, the Board has a very limited role in the budget adoption process. Here, the mayor is the dominant actor. He alone has the power to propose the budget and to estimate the next year's revenues. Since, by law, the City must have a balanced budget [Financial Emergency Act for the City of New York § 8(1)(a) (N.Y. Unconsol. Laws § 5410[1][a] (McKinney 1979); *see also* Ch. § 1516)], the total expenditures proposed by the mayor cannot be increased unless the property tax is increased; that can be done only by the City Council. Unlike a legislature, the Board has no authority to levy taxes.

The Board has no power to adopt or reject any budget on its own. Rather, after the mayor proposes a budget, the Board and the City Council may each propose changes which "increase, decrease, add or omit" specific units of appropriation, but the proposals are effective only if both bodies agree. Ch. §§ 120(a)(b). Even if the City Council and the Board agree on

changes, the mayor may still veto the changes—a veto that cannot be overridden absent a two-thirds vote of the City Council or the Board; if one body votes to override by a two-thirds vote, the other must approve the override by a majority vote. *Id.* § 121. The Board plays a similar role with respect to the capital budget. *Id.* §§ 222(a); 222(b); 223(c). That budget is largely a collection of particular capital projects each of which has a very local impact—for example, construction of a school playground or reconstruction of a local street.

The Board's assumption of powers and its limited role in the budget process has been the result of evolution and experimentation and has coincided with the removal of powers from the borough governments. The steady transfer of these powers from the boroughs has been important in the process of providing cohesive government to five disparate boroughs. The transfer would not have been successful without a consensus that the Board could exercise such powers and at the same time be sensitive to local concerns. The creation and maintenance of that consensus is attributable in large part to the composition and voting structure of the Board.

The Board's Structure: No one runs for a seat on the Board of Estimate. Membership is one of the prescribed duties of the borough presidents, who are elected by the voters of their respective boroughs, and of three executive officials elected by the entire city: the mayor, the president of the City Council, and the comptroller. On all matters over which the Board has exclusive jurisdiction—that is, all issues except the budget—the three city-wide officials cast six votes (two votes each) and the borough presidents cast five votes (one vote each). In adopting the budget, the mayor, having the exclusive right to propose a budget and veto power over any changes prior to adoption, does not cast a vote as a Board member. In all cases, budget or not, a quorum of six votes must exist consisting of at least two city-wide officials. No action may be taken without a majority of all votes authorized to be cast. In addition, an (unwritten) tradition of borough president deference provides that, on matters peculiarly affecting

only one borough (as a great many matters do), the other borough presidents normally defer to and support the president whose borough the Board's action affects (JA280, 462).

The Board's voting system assures that the Board cannot act without the consent of officials elected by a majority of the City's voters. On non-budget matters, action requires six out of eleven votes. The Board thus cannot exercise these exclusive powers without the vote of at least one person elected by all the City's voters, plus the votes of at least four borough presidents representing at least 70% of the City's population. The presidents of the three less populous boroughs (Manhattan, the Bronx and Staten Island) cannot override the presidents of the two larger boroughs (Brooklyn and Queens) without the votes of at least two of the three officials elected by all city voters. No combination of borough presidents can overcome the collective will of the city-wide officials.

On budget proposals, the process is dominated by the city-wide interests (as embodied in the mayor and the City Council). Five of nine votes (plus the majority of the City Council) is needed to enact changes in the mayor's proposed budget. These changes are not effective unless the mayor "votes" in favor of the changes by not vetoing them. If the mayor vetoes the changes, either five of nine Board votes (if two-thirds of the City Council votes to override) or six of nine (if only a majority of the Council so votes) is needed to effect the change. Thus, even with the mayor's consent, the Board cannot alter the budget without either all of the borough presidents or at least three borough presidents plus an official elected by all the City's voters (and the consent of a majority of the City Council). Only a unanimous vote of the borough presidents (plus at least two-thirds of the City Council) can bring about a change against the will of all the city-wide officials.

The control by the city-wide members of the majority voting power has been basic to the Board's composition from the outset of consolidation. The 1901 charter revision allocated three votes to each of the three city-wide officials, one vote to each borough

president, and, with 88% of the City's population then resident in the two more developed boroughs, one additional vote each to the presidents of Manhattan and Brooklyn (JA63). In 1958, in recognition of actual and anticipated growth in the other boroughs, a charter revision adopted the system that exists today: Each city-wide official was given twice the number of votes (four) as the equal number (two) given to each borough president (JA70); to make the arithmetic simpler, a 1978 charter revision halved each member's vote (Ch. § 62).

Now that so much authority has devolved upon the central authority, equal votes for borough presidents is crucial. The evolutionary transfer of local powers to the city was made possible only by assuring the citizens of each borough that their elected president would have credible and equal voice in the Board's deliberations. At the same time equal votes for borough presidents has been balanced by giving majority control to the city-wide constituency—through city-wide officials and, in the budget process, through them and the City Council. This compromise enabled the State to assuage the concerns of the citizens of the less populous boroughs, override political opposition to regionalism, and achieve the city-wide perspective through consolidation of local powers into a central authority. In effecting and maintaining this compromise, the state took account of the local nature of the Board's powers; the disparate impact of those powers on particular communities; the value of imparting those powers to a compact body of elected officials; the need to assure that no segment of the population be disenfranchised; the importance of equality to a collegial operation that could achieve consensus; and the benefits of using existing borough institutions and officials to facilitate and complement the Board's operation.

The Board's Operation: Usually, history shows, the Board has acted unanimously (JA86-88, 93-95). A three-year study of more than 13,000 Board votes during the first part of this decade showed that 97% were unanimous; a like study over ten years ago produced an almost identical result (JA94), as did one over thirty

years ago (JA285-286). The consensus evidenced by these studies has been essential to the cohesive government of a large metropolitan area (JA94, 103-104, 139-40, 165-167). It is a consensus encouraged by the compact size of the Board, the status of its members as the highest elected officials in the region, the equality accorded to each borough president, the collegiality such equality occasions, the tradition of borough-president deference, and the majority control of the city-wide members. These dynamics of the Board dilute parochialism, invite balanced perspectives, compel reasoned resolution of conflicts between regional and local interests, provide a check on mayoral power, and permit decisive action based on broad popular support (JA74, 276), resulting in what two commentators called an "institutional miracle" (JA285).

The Board's effectiveness has constantly been reaffirmed. Few forms of government anywhere have been subjected to as much official scrutiny as New York City's. Yet the Board's current composition and voting system have consistently satisfied those authorized to examine and alter the structure of city government. Every official study of New York City government in the past eight decades (including the study appellees' own lead expert conducted [JA54-189]) has endorsed the 1901 Charter Commission's view that borough representation is essential to the Board's effective performance of its functions. The studies demonstrated that borough-president representation was important to the city as a whole as well as to the boroughs because administration of the manifold affairs of the city required intimate familiarity with the conditions and needs of the five boroughs. The Board's composition and voting system, these observers concluded, permitted the transfer to the Board of central powers that no other entity could assume. Characteristic is the report of a comprehensive Charter Revision Study in 1975, which concluded:

> The nature of the Board of Estimate has been shaped by special needs which have arisen during particular times in the City's history. Specifically, it has been a magnet for issues that require deliberative judgments in the best interests of the City as a whole, and it has repeatedly been assigned responsibility for sensitive matters . . . that have not been adequately handled by other bodies or officials.
>
> Any charter revision affecting the Board of Estimate cannot lose sight of this incremental assimilation of authority. The Board is not a body devised by esoteric social scientists, but rather an institution forged from the singular historical development and attributes of New York City and its distinct geographic parts. *Preliminary Recommendations of the State Charter Revision Commission for New York City* 84 (1975); *see also* N.Y.C. Charter Revision Commission, *Preliminary Report and Draft of Proposed Charter for the City of New York* 17 (1936).

These government studies have not been inattentive to the population differences among the boroughs. To the contrary, the Board's electoral design assures fair and effective voting power to the City's population. These studies have recognized that the Board's combination of city-wide and borough officials accomplished majority rule with reasonable equality among city voters. Composing the Board solely by reference to population, on the other hand, would effectively disenfranchise significant segments of the population. Every qualified expert (including appellees' own) agrees that allocating the votes on the entire Board based solely on strict population would reduce the people of Staten Island to the status of bystanders in the Board's decision-making (JA166-167; 404-499; 510-511). If such a result were mandated it would become much more difficult for the State to transfer powers from local communities to a central authority and coordinate regional resources based on broad consensus.

The Prior Proceedings

Background: Appellees commenced this action in December 1981. They sought a declaration that the legislation forming the Board of Estimate—sections 61 and 62 of the New York City Charter—infringed their constitutional right to equal representation. They asked for an injunction compelling the City to remedy

this alleged infringement by altering either the composition or the voting system of the Board (JA29-36).

On April 5, 1982, claiming that the Board's composition was illegal *per se* in deviating from the ideal of equal representation by 78% (down from the 153% their complaint alleged using the same population figures), appellees moved for summary judgment (JA42-47). Relying on *Bergerman* v. *Lindsay*, 25 NY2d 405, 306 N.Y.S.2d 898, 255 N.E.2d 142 (1969), *cert. denied*, 398 U.S. 955 (1970), which held that the Board of Estimate was not subject to the principle of one person, one vote, the City cross-moved for summary judgment dismissing the complaint as a matter of law. On December 1, 1982, the District Court granted the City's motion (A208, A228-A229).

On May 16, 1983, the Court of Appeals for the Second Circuit reversed. The Court ruled that, under this Court's decisions since *Bergerman*, any government body whose membership is ultimately determined by popular vote is subject to the principle of one person, one vote. (A186, A196-200). In so ruling, however, the Court declined to hold that the Board's composition violated that principle (A200-201). Rather, the Court remanded to the District Court for a determination whether the Board's makeup offends the equal protection clause (200-201, 205).

The Court of Appeals recognized the uniqueness of the Board and expressly contemplated that the Board's blending of majority votes with minority representation was "one issue to be examined on remand" (A204). The District Court was to determine "the degree of malapportionment present (after deciding on the appropriate methodology for doing so)" (A201). The question of methodology was important because, as the Court of Appeals stated, the "fact that three members are elected at large from the entire city raises novel issues as to how an individual voter's opportunity to elect these members should be assessed in conjunction with his opportunity to elect his borough representative" (A207).

The District Court's Rulings: Upon remand, the District Court bifurcated the issues to consider first the extent, if any, to which the Board's composition deviated from population equality, and then, if a deviation exceeded minimal levels, whether state interests justified whatever variances existed (A122-123).

In the first stage, the City argued that the Board's voting structure assured majority rule. Appellees, who had the burden on this issue, proposed mathematical formulae which purportedly showed material deviations from strict voter equality. Appellees proposed at least six different methods. Some of these methods, like those set forth in their complaint and initial summary judgment motion, purported to calculate the maximum deviation from perfect equality by assigning the six city-wide votes among the five boroughs based on either (1) a percentage of the city population in each borough (producing a deviation of 153%) or (2) actual population (78%) (JA33-35, 47). Yet others of appellees' formulae, which they claimed to derive from *Abate* v. *Mundt*, 403 U.S. 182 (1971), entirely disregarded the city-wide majority voting bloc and purported to compute a maximum deviation (132.9%) based solely on population differences among the boroughs. Still other methods, proposed by intervenor-appellant Ponterio, asserted deviations of between 16% and 30% (JA221-23, 356-57, 360-66).

On August 21, 1984, the District Court chose a version of appellees' "Abate test," and held that the Board deviated from population equality by 132.9% (A119, 138-139). Under this test, all the complexities of the Board of Estimate voting structure—the blending of a majority of city-wide votes and a minority of borough votes—are simply ignored. According to the District Court, the Board's voting system was "unexceptional" and occasioned no "first-impression measurement problems" (A136). The District Court perceived in this Court's jurisprudence an "impatience with mathematical metaphysics" which disfavored "the speculative contamination inherent in injecting the city-wide membership into the inequality calculus." (A131, 161). Accordingly, examining only the deviations derived from the

votes of the borough presidents, the Court arrived at its percentage merely by dividing the City's population into five—obtaining the supposedly ideal population district (1,414,206)—and then adding the percentages by which the populations of the largest borough (Brooklyn) and the smallest (Staten Island) deviated from that ideal (57.7 + 75.2) (163-164). No account was taken of the existence on the Board of the city-wide officials or of their majority voting strength.

Having thus set an extravagant population deviation unrelated to the Board's actual operation, the District Court called upon appellants to justify it. In this second stage, appellants established that the Board's composition and voting system rest on long-standing state policies recognized as valid by this Court (JA382-90), that the Board, as constituted, is "an important and useful part of New York City's government" (JA506), and that it could not be changed without disenfranchising local interests (JA502, 511). Appellees conceded that the Board "is needed" and "works" (JA547). Nonetheless they insisted that untested alternative plans for the Board's composition and voting system would satisfy all "valid" state policies (that is, those policies that appellees believed did not depart from strict population equality) (JA548-49). Abandoning their earlier claim that a system of weighted voting among borough presidents on the Board was "unacceptable" (JA208), appellees now argued that such a system would bring the Board within constitutional limits.

On November 19, 1986, the Court ruled that appellees had failed to justify the adjudged deviation of 132.9% (A55, A112). The Court agreed that the avowed purposes of the Board's composition—facilitating the City's ability to exercise central authority; assuring meaningful representation of local interests on matters primarily of local concern; preserving historical, geographic and political boundaries; maintaining a small, collegial and effective body of the City's highest elected officials; providing a check on mayoral power —are in fact the purposes the Board is meant to serve (A82-97). The Court did not dispute that these were legitimate objectives which the Board's electoral design

fully accomplished. The Court ruled, however, that a state must choose the government alternative that is least restrictive of voting rights (A97-100). The existence of hypothetical government structures with smaller deviations is sufficient to invalidate the existing structure (A109-110). The Court found that there were such hypothetical alternatives and thus enjoined the City to restructure the Board *(id.)*.

The District Court's Method of Measuring the Alleged Deviation from Strict Voter Equality: During the second stage of the proceedings before the District Court, the illogic of its methodology became clear. As noted, the appellees had conceded that the Board, as constituted, served many valid state interests. Nonetheless they claimed that the Board could be structured differently and that these alternative structures, while deviating less from strict voter equality, would not sacrifice any legitimate state interests. Thus, under appellees' theory, it was necessary for them to construct what they believed to be acceptable alternative structures and then to measure the deviations from strict voter equality which the alternatives created.

An examination of these alternatives highlighted the fundamental flaws in the methodology adopted by the District Court during the first stage of the proceeding. As we will explain more fully below (*see* pp. 33-34 *infra*), if, as did the District Court, one ignores the votes of the three city-wide officials and calculates deviations entirely upon the basis of population differences among the boroughs, it is possible to have many weighted-voting systems which produce no significant deviation from "perfect" equality but which, as under the present system, leave each borough president with the same effective voting power as the others.

It was not accidental, then, that when appellees proposed alternative weighted-voting structures, they purported to measure the resulting deviations not based upon simple arithmetical differences in population among the boroughs (as had the District Court during the first stage of the proceedings), but instead based

upon an analysis of the real voting power of the borough presidents (JA535-36; JA567-68). "Voting power" analysis, formulated first by Professor John Banzhaf and used by several appellate courts, examines all the possible voting combinations in a body and then determines in what percentage of these combinations a particular voter can cast the deciding or "critical" vote. That percentage is the measure of the voter's "voting power." According to appellees, "[w]eighted voting under a Banzhaf mathematical model is employed to assure meaningful participation and representation for even the smallest participant." (JA535, see also JA536, 539-543, 555-58).

Appellees, however, did not apply the analysis correctly. Appellees' errors were pointed out by the inventor of the analysis upon which they purported to rely, Professor Banzhaf, in his application to appear as an *amicus* in the District Court (JA621-22). Professor Banzhaf set forth in his amicus brief how his analysis could properly be applied not only to various alternative weighted voting structures proposed by appellees but also to the existing voting structure of the Board.[3]

The Banzhaf Index provides a way to measure, and then to compare, the relative powers of individual voters to affect outcomes on a body such as the Board of Estimate. The analysis proceeds on two levels—first, a determination of the power of each elected representative to affect the outcome of a vote, and second, a determination of the power of an individual voter to affect the election of the representative. In the case of the Board of Estimate, there is an additional step because, with respect to the Board, each voter in a borough draws his or her power from the ability to affect the election of four representatives—three city-wide officials and one borough president. Professor Banzhaf's analysis, which will be more fully explained below (see pp. 34-38, *infra*), confirmed what is in any event apparent. If one properly accounts for the majority votes of the city-wide officials, the deviations from strict voter equality are substantially

3. The District Court would not permit Professor Banzhaf to appear as *amicus* (A114). With the consent of all parties and the approval of the Court of Appeals, he appeared as *amicus* there.

less than the 132% found by the District Court. They are an average and maximum of 7% and 31% respectively (see p. 37, *infra*).

As noted, in spite of the evident flaws in the District Court's methodology—flaws implicitly recognized in appellees' own submissions during the second stage of the proceedings—the District Court ruled as if the Board were made up only of five borough presidents and measured disparities based entirely upon the population differences among the boroughs (A162-64). The Court disregarded the existence and majority voting power of the three city-wide officials. Based on this incorrect analysis, the District Court found a deviation of 132% and ruled that the valid state policies embodied by the Board did not justify such a deviation (A164-74).

The Court of Appeals' Decision: On October 8, 1987, the Court of Appeals for the Second Circuit adopted the reasoning of the District Court and affirmed. Although the Court (per Oakes, J.) recognized that the presence of the city-wide members on the Board might "mitigate somewhat the effects of the deviation in voter equality" (A47), it nonetheless held that, "in calculating voter equality for equal protection purposes the citywide members should be, if not ignored, not considered in the appropriate analysis" (A33). The Court based this conclusion on its view that the borough presidents and the city-wide officials "represent different interests" and that a resident of a particular borough may have an interest *qua* borough resident and another interest *qua* city resident (A32). The Court's analysis, however, simply described the fact that the Board's structure encompasses complex relationships. The analysis provided no grounds for ignoring the complexities in favor of a model which does not exist in reality.

Second, the Court rejected the Banzhaf Index which was found to be "insufficiently realistic" (A24). In particular, according to the Court, the Banzhaf Index, which treats each possible voting outcome as equally likely, ignores such imponderables as partisanship, ethnicity, race, force of personality, voting blocs, or any

other influences that may make one voting combination more likely than another (A 26). However, as the Court itself recognized (A28-29), its own analysis is subject to the same criticism. Indeed, what the Index attempts—along with all other methods of analysis accepted by the courts—is a way of measuring voting power under the assumption that each person's vote is, and should be, the equal of another's.

Finally, the Court adopted, without further analysis, the District Court's view that the existence of hypothetical voting plans with smaller deviations from strict voter equality requires the rejection of the Board's voting structure (with larger deviations) —in spite of the valid state interests justifying that Board's structure (A39).

Judge Newman, though concurring in the majority opinion, wrote separately on the question whether the city-wide votes on the Board should be excluded from consideration (A48). Judge Newman recognized that until this case, "the only cases considering the constitutionality of representation arrangements that combine district representation with at-large representation have involved bodies in which the voting power of the at-large members was a small fraction of the total voting power" (A49). These cases did not control because, "[w]ith the at-large representation so insubstantial, the courts examined only the deviations of the populations of the districts" (A 49-50).

Judge Newman also recognized that, contrary to the earlier cases, in this case, the at-large representation was not insubstantial (A49-51). Indeed, except in the budget process (when the power of the Board is, itself, substantially diminished and is shared with the mayor and the City Council, see pp. 10-12, *supra*), the at-large representatives control a majority of the votes. Judge Newman conceded that "[a]t some point" the voting power of the at-large representatives would become relevant or perhaps even dispositive (A 51). Without any further analysis, Judge Newman stated his conclusion that this case was not at that point (A53).

SUMMARY OF ARGUMENT

The Board of Estimate is a vital instrument of New York City's government. The Board is the body through which New York State has chosen to accommodate many different and sometimes competing interests. Most importantly, it is through the Board that New York has accommodated local needs and the needs of the larger consolidated city. The compromise embodied in the Board's structure has been successful. For almost ninety years the Board has fostered the growth, development, and effective government of our nation's largest city.

Although not disputing the success of this compromise, the courts below found it illegitimate and ruled that the Board of Estimate had to be restructured. The rulings below were not based on a finding of invidious purpose or result. There is no evidence of arbitrary whim, or of gerrymander, or of racial mischief. No facts suggested that the Board was unresponsive to the popular will or the hostage of a narrow minority of the city's populace. Rather the courts below found that the Board's blending of city-wide and local representation is inconsistent with the principle of one person, one vote.

The application of this principle by the courts below violated the basic tenets of this Court's equal protection jurisprudence. This Court has recognized the extraordinary complexity of local governments throughout the United States. The lower courts have been instructed not to apply the one person, one vote principle mechanically in a way that effectively forces all local governmental bodies into the same molds. There is room in the one person, one vote principle for innovation and flexibility.

The courts below did not heed these lessons. Their error may be seen most clearly in the way they analyzed the deviations from voter equality alleged by appellees. The Board of Estimate is a body which, by law, does not have a simple, one-dimensional voting structure like, for example, a typical legislature might have. There is instead a blend of city-wide and borough votes with a system of weighted votes that gives a majority to the city-wide officials.

The courts below did not address the Board's complexities. They thought it more "convenient" to find a simpler mold into which the Board could be squeezed. Accordingly, they ignored the majority city-wide votes and judged the Board as if—contrary to fact—it were a local legislature made up of only five borough representatives. On this basis, the courts below found a deviation from perfect equality (132%) that has no basis in the reality of the Board. The courts below also chose a method of analyzing the justifications for the Board which effectively gave them no weight.

A sounder analysis of the Board (that is, one more attuned to its real voting structure) would show deviations substantially less than those relied upon by the Court of Appeals. Indeed, even these lesser deviations (an average and maximum of 7% and 31% respectively) overstate the alleged harm to appellees. The fact is that under the Board's voting system, its powers cannot be invoked by officials elected by a minority of the voters in the city.

In these circumstances, and taking due account of the need for flexibility in local governments, the deviations from strict voter equality are justified by legitimate state interests. Surely the State of New York has a rational and important interest in creating a body which respects the principle of majority rule, supports the need for regional government, and also accommodates the need to provide a local voice on decisions that have local impacts.

ARGUMENT

THE COMPOSITION AND VOTING SYSTEM OF THE BOARD OF ESTIMATE COMPORT WITH THE CONSTITUTION.

A. The States Enjoy Broad Flexibility To Adopt Rational Electoral Plans For Sub-State Governments Which Achieve Reasonable Voter Equality.

Government, this Court long ago observed, "is the science of experiment." *Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204, 226 (1821). "[S]tate legislatures have constitutional authority to

experiment with new techniques,. . . ." *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421, 423 (1952). This authority embraces the power to decide on the "number, nature and duration of the powers conferred upon [municipal] corporations and the territory over which they shall be exercised." *Hunter* v. *City of Pittsburgh*, 207 U.S. 161, 178 (1907). The "extraordinarily wide latitude that States have in creating various types of political subdivisions and conferring authority upon them" is of "substantial constitutional significance." *Holt Civic Club* v. *City of Tuscaloosa*, 439 U.S. 60, 71 (1978).

The principle of "one person, one vote" cannot be divorced from these other constitutional principles. "One person, one vote" is not a mindless formula for computing the makeup of governing bodies; it is a standard to define the meaning of voting equality in a representative government. The equal protection clause requires that "a State make an honest and good faith effort" to achieve equality among voters. *Reynolds* v. *Sims*, 377 U.S. 533, 577 (1964). But fair and effective representation "does not depend solely on mathematical equality among district populations". *Gaffney* v. *Cummings*, 412 U.S. 735, 748-49 (1973). Other factors may be essential to achieve the goals of representative government. The Constitution does not "require that the State never distinguish between citizens" in weighing those factors, "but only that the distinctions that are made not be arbitrary or invidious". *Avery* v. *Midland County*, 390 U.S. 474, 484 (1968).

This Court has respected the need for flexibility in its application of the "one person, one vote" principle. Indeed, it has applied different standards depending upon the kind of body being judged. The most stringent standard—derived from Article I of the Constitution—requires "absolute equality" in the apportionment of congressional districts, *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 531 (1969), so that deviations of as little as 1% may be unacceptable, *Karcher* v. *Daggett*, 462 U.S. 725, 732-33 (1983). A less stringent standard of "substantial equality" applies to apportionment of state legislative districts, *Mahan* v.

Howell, 410 U.S. 315, 320-23 (1973), in which deviations of 10% or less need not even be justified, *White* v. *Regester*, 412 U.S. 755, 764 (1973), and valid state policies may justify far greater variances, *Brown* v. *Thomson*, 462 U.S. 835, 846-47 (1983).

The standard for sub-state government institutions has not yet been fully defined by this Court. But in no other area of apportionment law has this Court so emphasized the need for flexibility.

This Court did not determine whether the one person, one vote component of the equal protection clause applied to local or sub-state governmental bodies until several years after it had applied the principle to state legislatures in *Reynolds* v. *Sims*. *See*, *Hadley* v. *Junior College District*, 397 U.S. 50 (1970); *Avery* v. *Midland County*, *supra*, 390 U.S. 474. Prior to deciding that issue affirmatively in *Avery* and *Hadley*, this Court recognized the special needs of local governments and affirmed that the Constitution would not serve to frustrate localities in their ability to deal with local problems. In *Sailors* v. *Board of Education*, 387 U.S. 105 (1967), the members of Michigan's county school boards were selected, not by election, but by appointment. This Court, noting that a legislative office was not involved, held the one person, one vote rule not applicable to the appointive selection of the board members. The Court recognized that "[v]iable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation." 387 U.S. at 110-11.

Similarly, in *Dusch* v. *Davis*, 387 U.S. 112 (1967), at issue was a borough form of local government, with all eleven council members elected at-large but with seven of the eleven required to reside in each of the seven different boroughs. This Court, assuming the one person, one vote principle applicable, found no violation despite varying borough populations, because each councilman represented the entire city, not a particular borough. 387 U.S. at 115. Again the Court recognized the distinct and

complex problems of local government, stating that "[t]he Seven-Four Plan seems to reflect a detente between urban and rural communities that may be important in resolving the complex problems of the modern megalopolis in relation to the city, the suburbia, and the rural countryside". 387 U.S. at 117.

This Court's recognition of the special and complex needs of local and sub-state governments was reemphasized when it explicitly held the one person, one vote principle applicable to local elective bodies. In *Avery* v. *Midland County*, *supra*, 390 U.S. 474, this Court was faced with a "vast imbalance" resulting from the presence of 95% of the county's population in one of the four districts equally represented on the Commissioner's Court. This Court held the one person, one vote principle applicable to what it described as a "unit of local government having general governmental powers over the entire geographic area served by the body." 390 U.S. at 485.

Nevertheless, in *Avery*, as in *Hadley* (where the one person, one vote principle was held applicable to the election of the trustees of a junior college district), this Court cited the *Sailors* and *Dusch* opinions approvingly and reiterated that neither the Constitution nor the Court would serve as "roadblocks in the path of innovation, experiment, and development among units of local government." *Avery* v. *Midland County*, *supra*, 390 U.S. at 485; *accord*, *Hadley* v. *Junior College District*, *supra*, 397 U.S. at 58-59. And, in *Avery*, the opinion on which the Court of Appeals relied in striking down the Board of Estimate's voting scheme (A16-21), this Court reaffirmed the special deference accorded states in fashioning sub-state governing units (390 U.S. at 485):

> This Court is aware of the immense pressures facing units of local government, and of the greatly varying problems with which they must deal. The Constitution does not require that a uniform straitjacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems.

Because of this need for flexibility and innovation, as well as the smaller size of local governmental bodies, this Court has recognized that greater deviations on the local level may be tolerated than on the congressional or state legislative level. *Abate* v. *Mundt*, 403 U.S. 182, 185 (1971). Indeed, in reviewing a county legislature in *Abate*, this Court specifically approved a policy of "intergovernmental coordination", there between the county and town levels of government, which, like the Board of Estimate and the policies it fosters, had long-standing historical roots. 403 U.S. at 186.

To give force to these teachings requires a sensitive standard for assessing sub-state institutions. In shaping that standard, the courts should recognize that federal and state legislative bodies are different from local governing bodies which are much more numerous and have more varied powers and purposes. In applying the standard, the courts should permit the state substantial flexibility to consider valid factors which may bear on the special needs of local governments. The states should be paid considerable deference in accommodating these needs with the goal of voter equality. They must be free to pursue rational plans for local government and to make neutral compromises that achieve reasonable parity among voters without risking minority contro' A test that does not adequately account for these special needs—one which equates the design of sub-state governments with federal and state legislative apportionments—will construct "roadblocks in the path of innovation, experiment, and development among units of local government." *Avery* v. *Midland County*, *supra*, 390 U.S. at 485.

There is no reason to construct those roadblocks. The principal danger inhering in malapportioned congressional and state legislative districts is the insulation of a governing body from the popular will. There are, however, important safeguards against this danger at the sub-state level. The broad reforms in state legislative apportionment effected by this Court's decisions since *Baker* v. *Carr*, 369 U.S. 186 (1962) make it less likely that legislatures would tolerate the undue concentration of power in

undemocratic local bodies. Although *Avery* held that this safeguard alone does not exempt local governmental bodies from the one person, one vote principle, it is nonetheless a safeguard that supports a more flexible approach to the application of that principle. As Justice Powell wrote in a concurring opinion, "[I]t may be difficult to decide when experimentation and reasoned compromise have resulted in an impermissible delegation of those governmental powers that generally affect all of the people to a body with a selective electorate. But state legislatures, responsive to the interests of all the people, normally are better qualified to make this judgment than federal courts." *Ball v. James*, 451 U.S. 355, 373 (1981).

Deference to local structures chosen by the state also respects the limits of judicial competence. District lines for a federal or state legislative body serve only as units of representation. A strict standard for assessing the validity of a legislative apportionment does not entangle a court in essentially political judgments about how the legislature ought to exercise its powers. In a case such as this, however, the use of pre-existing boundaries is not simply a matter of convenience; a direct relationship exists between (on the one hand) the Board's formation, powers and operations and (on the other) the historic, geographic and political boundaries of the boroughs. Examining alternative boundaries or alternative structures for a body like the Board will inevitably require a court to make judgments about such highly political matters as the efficacy of regional governments, the nature and impact of the powers they hold, and the compromises needed to form and operate them successfully. In other words, the courts would be making judgments not about apportionment but about governance.

Moreover, in a case like this, deference to state policies makes even more sense because no judicial decree can fully assure the relief appellees seek. In a legislative apportionment case, a court can always order the legislature to reapportion so as to equalize voting power. Here, however, nothing in the Constitution requires the State of New York to compose the Board with elected

officials. Nothing now bars the State from deciding, in the face of the judgment below, that the Board shall be comprised of one representative from each borough whom the mayor (or borough presidents) shall appoint. *See Sailors* v. *Board of Education, supra*, 387 U.S. at 110-11 (states not obliged to provide for elections of non-legislative local government units). Thus, judgments like the one below may simply summon the use of insulated public authorities and other undemocratic appointive bodies to achieve the compromises which the elective body was designed to achieve.[4]

The lower courts' failure to recognize the special nature and needs of sub-state institutions infects the whole of their approach to this case. Confronted with a unique electoral design unsuited to the conventional tools of apportionment analysis, the courts simply bypassed the Board's unusual characteristics and treated the body as if drawing lines for a federal or state legislative district. Thus the courts disregarded the Board's most central feature—the majority control vested in its city-wide members. Because the courts below did so, they calculated a deviation from perfect equality that bears no relationship to the reality of the Board (See section B below). Moreover, the courts below adopted a test—the "least restrictive alternative" test—which has never been applied by this Court in judging deviations in local governmental bodies. That test is entirely inappropriate here because it effectively gives no weight to legitimate state policies that might justify deviations from strict voter equality (See section C below).

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4. Our claim that an overly rigid application of the one person, one-vote principle will simply shift the powers of sub-state institutions to unelected entities is not idle surmise. Among the proposals made in the wake of the judgment below was the transfer of the Board's exclusive powers to appointive agencies. *See* Preliminary Recommendations of the New York City Charter Revision Commission, Memorandum to Commission Members, March 28, 1988; *compare Oliver* v. *Board of Education*, 306 F. Supp. 1286 (S.D.N.Y. 1969) (invalidating elective system for 10-member City Board of Education comprised of two representatives from each borough) with N.Y. Educ. Law § 2590-b (McKinney 1981) (after *Oliver*, substituting appointive system).

B. The Courts Below Erred in Refusing to Assess the Representation Afforded to City Residents through their City-Wide Representatives.

In determining whether the Board's composition and voting structure comply with the equal protection clause's one person, one vote principle, the courts below ignored the Board's city-wide members and their six majority votes and determined the issue as if the Board contained only the borough presidents. No decision of this Court supports such a view. The injury appellees allege is that the law denies them, as Brooklyn residents, the same power to elect the Board of Estimate which the residents of Manhattan, the Bronx and Staten Island allegedly enjoy. The law, however, allows each voter three representatives with two votes on the Board, plus another representative with one. A litigant cannot show a denial of equal protection of law by reference solely to some of the protection the law actually provides. So, here, appellees cannot show that the law discriminates against their voting rights in electing borough representatives on the Board without regard to whether their opportunity to elect the at-large representatives substantially repairs any disparities borough representation may occasion.

The reason is obvious. The two so-called "components" on the Board, local and at-large, do not hold any government powers as separate "components." Whatever powers members of each "component" hold, as Board members, reside in the entire Board; the Board members exercise Board powers not as "components" but only as a full Board. Thus, it is impossible to divorce a voter's opportunity to elect a borough president who sits on the Board from the same voter's opportunity to elect other representatives who also sit there. Weighing a voter's chance to elect a "component" that alone has no power is a meaningless exercise.

The courts below engaged in this meaningless exercise in part because, in the words of the District Court (A180-81, n.11), the city-wide Board members have "preordained" powers which are "manifestly demarcated" from those of borough presidents. That the city-wide officials (as well as the borough presidents)

have responsibilities other than as Board members does not, however, change the fact that the Board's membership cannot exercise the Board's powers except as one body. And because the Board can operate only as one body, a citizen's relative voting strength to elect the Board must take account of that citizen's opportunity to vote for all his or her representatives on the Board.[5]

Nor is it an answer to say, as the lower courts did, that the city-wide officials and the borough presidents represent different "interests." This *ipse dixit*—a profound misconception both of the concept of regionalism and of the actual role of borough presidents as bridges between the City and local communities—is no excuse for ignoring the source of the constitutional injury appellees assert. That injury cannot stem from an abstraction about different "interests"; it derives, if anywhere, from the Board's exercise of government power. And, as noted, the borough presidents and city officials do not exercise any of the Board's power as separate units.

The decision of this Court upon which the lower courts relied—*Abate* v. *Mundt*, *supra*, 403 U.S. 182—does not support the result they reached. That case involved an apportionment plan for multi-member districts in a county legislature. The plan had no at-large members or weighted votes, and, this Court noted that plaintiffs had failed to show that multi-member districts affected voting strength. *Id.* at 184 and n.2. In consequence, the Court held that a comparison of the populations in each district against an "ideal" district with perfect equality could properly measure relative voting power. But nothing in the case purports to impose that method on all other cases or to disapprove the use of different standards to assess different governing bodies. To the contrary, this Court's cases have instead "been noteworthy for the

5. *See Andrews* v. *Koch*, 528 F. Supp. 246, 250 ns. 6 & 7 (E.D.N.Y. 1981), *aff'd w/out opin.*, 688 F.2d 815 (2d Cir.), *aff'd mem. sub nom.*, *Giacobbe* v. *Koch*, 459 U.S. 801 (1982) (citizen's right to elect both at-large and district members must be computed together because members exercised power only "as one body").

nonpromulgation of strict mathematical tests," "especially concerning units of local government." *See League of Women Voters* v. *Nassau County Board of Supervisors*, 737 F.2d 155, 171 (2d Cir. 1984), *cert. denied sub nom.*, *Schmertz* v. *Nassau County Board of Supervisors*, 469 U.S. 1108 (1985) (emphasis in original).[6]

This policy is wise. To require a single yardstick for measuring a state's consideration of population is to confine the states to choices in sub-state government which only that yardstick can measure. However logical the *Abate* method may be in assessing relative voting power in a one-dimensional body, it makes no sense to apply that method to a multi-dimensional body combining officials elected at-large who control a majority of the body's voting strength with officials elected from districts who hold equal votes.

The analysis of the courts below leads to entirely illogical results. For example, suppose a system in which the city-wide representatives each had 100 votes and the five borough representatives had 10 votes each. Under the analysis of the courts below, this system would be unconstitutional even though no borough representative has the power to affect any vote of the Board.

Or, using the same analysis (that is, ignoring the city-wide votes and measuring deviations entirely based on the populations of the boroughs without regard to the real voting power of the representatives), it is quite easy to have weighted-voting systems

6. As Judge Newman recognized in his concurrence below, none of the other cases relied upon by the majority mandates its conclusion (A49). In none of those cases was the issue of measuring at-large members raised or decided. In none of the cases, moreover, did the at-large members control a majority of the governing body. *See Avery* v. *Midland County*, *supra*, 390 U.S. at 476 (one at-large member with voting power only in event of a tie); *Markoe* v. *Legislature of Virgin Islands*, 592 F.2d 188, 190-91 (3d Cir. 1979) (one at-large vote of fifteen); *Perry* v. *City of Opelousas*, 515 F.2d 639, 641-42 (5th Cir. 1975) (one of six); *Latino Political Action Comm., Inc.* v. *City of Boston*, 568 F. Supp. 1012, 1015 (D. Mass.), *stay denied*, 716 F.2d 68 (1st Cir.), *stay denied* 463 U.S. 1319 (1983) (Brennan, J., in chambers) (four of thirteen); *Cohen* v. *Maloney 410 F. Supp. 1147, 1149 (D. Del. 1976)* (five of thirteen); *Martin* v. *Venables*, 401 F. Supp. 611, 613 (D. Conn. 1975) (one of eleven).

which would satisfy the test of the courts below but would still give the borough presidents equal voting power.

Suppose each of the city-wide officials casts 50 votes and the borough presidents together cast 51 votes weighted in exact proportion to the populations of their respective boroughs:

Brooklyn	16.1
Queens	13.6
Manhattan	10.3
Bronx	8.4
Staten Island	2.6

Using the analysis and methodology of the courts below, such a system would be entirely acceptable. Yet in spite of the perfectly weighted votes, the voting powers of all the borough presidents are equal, as is the case under the present structure.

The supposed weighted-voting structure has 201 votes (3 x 50 plus 51 for the borough presidents). A majority (101 votes) that includes at least one borough president may be obtained either by (1) a combination of any two city-wide officials (100 votes) and *any one* borough president or (2) a combination of any one city-wide member (50 votes) and *all five* borough presidents (51 votes). Thus, under the supposed weighted-voting structure, each borough president has voting power equal to the other. No one of them can affect the outcome more or less than any other, even though each has a different weighted vote (one that is proportional to the borough's population). Many other weighted-voting structures would lead to the same result.

No doubt if such a weighted-voting system were to be suggested, appellees would claim it was unconstitutional. And they would do so based on an analysis of voting power similar to the one rejected by the courts below. That is why, in suggesting weighted-voting schemes during the second stage of the proceeding in the District Court, appellees themselves did not use the analysis adopted by the District Court during the first stage (and by the Court of Appeals) but instead suggested an analysis based on the real voting powers on the Board (JA 535, see also JA 536,

539-43, 555-58). This analysis—the Banzhaf Index—provides a cogent and realistic way of assessing the representation on the Board of Estimate afforded to citizens of each borough. The analysis is straightforward and logical and not "metaphysical" or even "inconvenient" (compare A131 and 161-62 [District Court] and A13 [Court of Appeals]). In any event, it is an exercise that must be undertaken to obtain an accurate measure of alleged disparities when applying the equal protection clause to a body such as the Board of Estimate.

The Banzhaf Index measures the voting power of each citizen by (1) calculating the voting strength of each official for whom a citizen can vote, (2) determining the citizen's ability to affect the election of each such official, (3) adding together the complete voting power each citizen thus holds, and (4) thereby comparing the resulting voting strength of each citizen.

The first step is straightforward. On the Board as presently constructed, there are 552 possible voting combinations in which any one member can affect the outcome of a vote. Each borough president can cast the determining vote in 48 of these combinations (giving him or her a "voting power" of 8.7%). Each city-wide member can cast the determining vote in 104 of 552 combinations (giving him or her a "voting power" of 18.84%) (A40-41).

The next step is to determine the voting power each citizen derives through each of the representatives he or she votes to elect. One might be tempted here simply to divide the representative's "voting power" by the number of people who are represented. That simple division, however, presumes that each person's ability to affect the outcome of an election decreases proportionately with the number of voters. In fact, as explained by Professor Banzhaf, as a mathematical matter, the individual's power to affect the outcome of an election decreases in proportion to the square root of the number of voters.[7] See Banzhaf, *Multi-*

7. We quote here Professor Banzhaf's own explanation for this proposition set forth in his *amicus* brief to the Court of Appeals (page 15, n. 17):

> It is easy to prove that in situations where each person (legislator or citizen-voter) has one vote, his or her ability to cast a critical or decisive

Member Electoral Districts—Do They Violate the "One Man, One Vote" Principle, 75 Yale L.J. 1309, 1319-23 & n.28 (1966); *See generally* Banzhaf, *One Man, ? Votes; Mathematical Analysis of Voting Power and Effective Representation*, 36 Geo. Wash. L. Rev. 808 (1968); Banzhaf, *One Man, 3,312 Votes, A Mathematical Analysis of the Electoral College*, 13 Vill. L. Rev. 303 (1968); R. Dixon, *Democratic Representation—Reapportionment in Law and Politics*, 541-42 (1968).

Thus, using the Banzhaf Index, the voting power of a Brooklyn voter can be calculated as follows:

$$\frac{\text{Voting Power Mayor (18.84\%)}}{\text{Square root of City pop. (2659)}} + \frac{\text{Voting Power Compt. (18,84\%)}}{\text{Square root of City pop. (2659)}} + \frac{\text{Voting Power City Council Pres. (18.84\%)}}{\text{Square root of City pop. (2659)}} + \frac{\text{Voting Power Bklyn Boro. Pres. (8.7\%)}}{\text{Square root of Brooklyn pop (1494)}}$$

vote doesn't decrease linearly (proportionately) with the number of people voting. Where the number of persons voting is small, one can calculate by hand the total number of voting combinations, and the number (and percentages) in which each person can cast a critical vote. For example, if only 3 people vote, and each has only one vote, there are 8 possible voting combinations, and each person can cast a critical vote in 4; i.e., in half of the voting combinations, a change of the vote of a single legislator will change the outcome. For somewhat larger numbers, the results are as follows:

Column 1 Number of Persons Voting	Column 2 Total Number of Voting Combinations	Column 3 Number of Combinations Where a Person Casts a Critical Vote	Column 4 Percent of Combinations Where a Person Casts a Critical Vote
3	8	4	48 = 50%
5	32	12	12/32 = 37.5%
7	128	40	40/128 = 31%
9	512	140	140/512 = 28%

As shown above, if the number of voters increases from 3 to 9 (a factor of 3), relative voting power doesn't decrease by a factor of 3 (50% divided by 3 = 16.7%), but rather approximately by the square root of 3 (which is 1.732): 50% divided by 1.732 = 28.9%. For larger numbers of voters, voting power can be calculated by using Stirling's Formula, and is found to decrease according to the square root of the number of persons voting. For a more detailed explanation, including the precise formulas, see Banzhaf, Multi-Member Electoral Districts—Do They Violate the "One Man, One Vote" Principle, 75 Yale L.J. 1309, 1320-24 (1966).

The following chart makes this calculation for a voter in each of the five boroughs as well as for a voter in an "ideal" borough with the average population of 1,414,206. The chart shows an average and maximum deviation from the ideal of 7.4% and 30.8%, respectively:

Borough (Population)	Square Root	City-Wide Voting Power	Borough Voting Power	Total Voting Power	Deviation
Brooklyn (2,230,936)	1494	.021256	.00582	.0271	−5.15%
Queens (1,891,325)	1375	.021256	.00632	.0276	−3.35
Manhattan (1,427,533)	1195	.021256	.00728	.0285	−0.25
"Ideal" (1,414,206)	1189	.021256	.00731	.0286	0.00
Bronx (1,169,115)	1081	.021256	.00805	.0293	+2.55
Staten Isl. (352,121)	593	.021256	.01467	.0359	+25.65
		Total Deviation:			30.8
		Average Deviation:			7.4

The Court of Appeals did not find fault with the mathematical theory upon which the Banzhaf Index is based. Nonetheless it rejected the Index as "insufficiently realistic". This criticism is based on the fact that the Index weighs voting strength on the Board as if all the Board's voting combinations are equally likely.

It is true, as the Court of Appeals said, that the Index does treat all votes as equally weighty and does not not attempt to weigh the effects of parties, race, voting blocs, or other intangible factors that can influence voting combinations on a particular governing body; no mathematical formula can take account of those imponderables. The same may be said of all the more conventional tools in apportionment analysis, including, as the Court of Appeals itself recognized (A34), the tool adopted by it. None of these tools attempts to measure the obvious differences, say between, on the one hand, the weight of a citizen's vote for a state representative who is a freshman member of a minority political party and, on the other, the weight of another citizen's vote whose representative happens to be Speaker. That the

Banzhaf Index thus follows the same course in treating all voters as equal and all voting combinations as equally likely only fortifies its utility as a neutral measure of relative voting power. It is appellees who must then show that, as a matter of fact, the intangibles of party politics, race, and the like, operate in the real world to increase the disparities the Index reflects.

Such is the proper lesson of *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971), the case on which the Court of Appeals relied in rejecting the Index here. In *Whitcomb*, plaintiffs challenged a state plan for a state legislature that included multi-member districts. They invoked the Banzhaf Index to show that, in theory, electors in multi-member districts had greater voting power than their counterparts in single-member districts. The Court understood that acceptance of this theory might mean, contrary to the Court's prior holdings, that multi-member districts were *per se* illegal (403 U.S. at 142-43; 147). The Court was understandably reluctant to so rule without a much deeper exploration of the ways in which multi-member districts operated throughout the country (403 U.S. at 147). Thus, in declining to hold multi-member districts *per se* illegal, this Court did not quarrel with the Banzhaf theory or its mathematics, but held only that, on the record before it, the theory was insufficient to show that "real-life impact" of multi-member districts discriminated among voters.

This case is very different. Here we invoke the Index not to destroy a government structure which should have a strong presumption of constitutionality but to defend one. We urge the Index's use to analyze a complex institution because other methods, and specifically the one adopted by the Court of Appeals, do not accurately reflect the reality of the institution. The Court of Appeals criticized the Index because it is more complex and less "convenient" than the method chosen by that Court. However, simplicity and convenience are not always virtues especially when, as here, they submerge the reality of the institution being judged. "Convenience", as seen by the courts below, would mean that local governments would have to foreswear flexibility and experimentation and fit themselves into a preordained "simple"

mold. The very real interests that a locality has in its form of government would be sacrificed to satisfy the mandates of a wholly-artificial arithmetical construct.

We do not suggest that the Index's use is appropriate in every case. It is sufficient that in this case the formula produces a reasonable explanation of the Board's voting system.[8] The results obtained from the Index in fact make sense. As may be expected, the deviations from strict voter equality are substantially less than what the courts below found, because those courts did not account for the majority city-wide votes. In addition, the Index expresses in arithmetical terms what may be seen by the naked eye. The Board's blending of city-wide and borough votes gives substantial deference to the principle of majority rule. The Board's powers cannot be invoked without the concurrence of officials elected by the majority of the citizens. See pp. 11-12, *supra*. As we show in section C below, in these circumstances, and giving due regard to the flexibility properly allowed to local governments, the state's legitimate interests justify the deviations—correctly calculated—from strict voter equality.

C. The Board of Estimate Embodies a Rational Plan for Regional Government that Promotes Legitimate Policies. Those Policies Amply Justify the Deviations from Perfect Equality in the Board's Voting Structure.

That a state may justify deviations from strict voter equality is clear. "Neither courts nor legislatures are furnished any specialized calipers that enable them to extract from the general language of the equal protection clause of the Fourteenth Amendment the mathematical formula that establishes what range of percentage deviations is permissible, and what is not."

8. Other courts have sustained the use of Professor Banzhaf's "voting power" principles to design constitutionally-acceptable weighted-voting structures. *See, League of Women Voters* v. *Nassau County Board of Supervisors, supra*, 737 F.2d at 170; *Franklin* v. *Krause*, 32 N.Y.2d 234, 298 N.E. 2d 68, 344 N.Y.S.2d 885 (1973), *appeal dismissed for want of a substantial fed. question*, 415 U.S. 904 (1974); *Iannucci* v. *Board of Supervisors*, 20 N.Y.2d 244, 251-54, 198-200, 282 N.Y.S. 2d 502, 507-10, 229 N.E. 2d 195, 198-200 (1967).

Mahan v. *Howell, supra,* 410 U.S. at 329. From the beginning of its one person, one vote jurisprudence, this Court has said that a state may depart from strict voter equality based on "legitimate considerations incident to the effectuation of a rational state policy." *Reynolds* v. *Sims, supra,* 377 U.S. at 579. Indeed, in *Mahan,* this Court expressly rejected the lower court's adoption of a mathematically more perfect plan and did so precisely because the existing plan rested on legitimate state policies. 410 U.S. at 320, 329-30. No decision of this Court has purported to place any specific deviation beyond justification.

Brown v. *Thomson, supra,* 462 U.S. 835, so confirms. That case involved the apportionment of Wyoming's House of Representatives. Counties in Wyoming had historically served as units of local government (in much the same way as boroughs served in New York). Under the Wyoming constitution, each county was required to be represented in the legislature by at least one senator and one representative. The least populous of Wyoming's counties, which would not have been entitled to its own representative based on population alone, had had its own representative in the legislature since 1913 (twelve years after Staten Island first had a representative on the Board of Estimate). As a result of requiring at least one representative for each of Wyoming's 64 counties, Wyoming had an apportionment plan with a maximum and average deviation of 89% and 16%, respectively. The least populous county had a population which was (as Staten Island's is) less than half the population of the supposedly "ideal" district.

Because the plaintiffs in *Brown* had limited their challenge to the dilution of their voting power resulting from the one representative given to the smallest county, the Court focused on the incremental deviation caused by the provision of that one representative. It was this incremental increase—which amounted to 34%—that the Court found justified by the State policies.[9] In

9. A 63-member plan, without the representative for the least populous county, would have had a maximum deviation of 66%. The 64-member plan, with the representative, had a maximum deviation of 89%. 462 U.S. at 846-47. The percentage increase was 34% (89% - 66%/66% = 34%).

weighing the avowed interests underlying deviations from mathematical perfection (there, the desire to give each county at least one representative), the Court said that "substantial deference is to be accorded the political decisions of the people of a State acting through their elected representatives." 462 U.S. at 847-48; see *Swann* v. *Adams,* 385 U.S. 440, 442, 444 (1967) (deviations of 26% and 34% in state legislature improper absent justification).

The state policies that justify the present structure of the Board are at least as compelling as those found sufficient in *Brown.* Most importantly, the Board is justified by the State's legitimate interest in fostering a stable, effective regional government.

Regionalism has been one of the major challenges for New York in this century. The interdependence of activities within a metropolitan area—the demand for housing, roads, garbage disposal, security, services—requires area-wide institutions to perform certain government functions (JA514-15). Yet an equally valid public policy and a political reality confront a state in shaping such sub-state units to address regional needs: People want some control over their affairs; they demand a say on matters closest to home; they insist on the right to participate in decisions that will affect their community. Moreover, there is the continuing fear, which must be assuaged if regional government is to work, that the smaller components of a regional federation will become the sites for the region's most noisome activities, like garbage disposal plants and prisons. It is reasonable for a state to determine that the benefits of pooling resources—bringing together Manhattan's huge tax base, Staten Island's large tracts of undeveloped land, the manufacturing and port facilities of Brooklyn, the residential communities of Queens and the Bronx—require some political adjustment to induce the people of each community to join and work in harmony.

For nearly a century the Board of Estimate has been the government institution which New York State has chosen to accommodate these many interests and to resolve the conflict between regional needs and the traditions and policies of home rule.

"Throughout the city's history," as appellees' expert wrote, "the Board of Estimate has been the principal body where this conflict, and, most significantly, the resolution of the conflict, has been deliberately institutionalized" (JA73). After nearly a century, "[t]he conflict between city-wide and local priorities, which necessitated the creation of the Board of Estimate, still exists" (*Id.*).

The District Court found, and the Court of Appeals did not dispute, that the Board of Estimate has been effective and efficient in its tasks (A87-90). Its success, however, is largely attributable to the very structure which, if the decree below stands, must be undone. The Board is small; it is made up of the region's highest elective officials; its borough representation respects historic and geographic boundaries as well as governmental structure now firmly woven into the City's fabric; and the equality of borough president votes and the blending of majority votes for the city-wide officials promotes collegiality and consensus and accounts for both the overriding regional and also the local interests.

Each one of these facets of the Board is supported by reasonable state policy and may be justified standing alone. Together they offer a compelling justification for the maintenance of the Board's present structure. Many of the decisions entrusted to the Board, like approving contracts or hearing appeals from zoning decisions or determining the appropriate use of a particular parcel of land, would be inappropriate for a large body. According to appellees' own expert, the "organic need for a small, elected body responsible for setting policy on matters relating to the city and its people has always been reflected in past charter revisions" (JA 163), with the result that the Board's size has not changed since 1901.

The use of boroughs as elective districts is surely justified as respecting historic, geographic and political subdivisions. Borough representation is rational because borough units are large enough to check the central authority, yet small enough to allow meaningful expression of local interests. The borough presidents

provide a local voice on decisions which have local impact. The state placed the Staten Island Borough President on the Board of Estimate not because it seemed a nice way to form a district. Rather, it was (among other reasons), that the use of land in Staten Island is controlled by a central authority whose decisions about the land peculiarly affect the people there. This Court has already said that respect for such historic and geographic subdivisions could justify deviations from strict voter equality. *Brown* v. *Thomson, supra,* 462 U.S. at 847-48; *Mahan* v. *Howell, supra,* 410 U.S. at 321-22; *Davis* v. *Mann,* 377 U.S. 678, 686-87 & n.2 (1964); *Reynolds* v. *Sims, supra,* 377 U.S. at 580-81.

Likewise, the granting of an equal vote to each borough president serves several important state policies. It fosters collegiality and facilitates the ability and willingness of members to achieve consensus. It assures the powerful expression of local interests on matters of peculiarly local concern. It also encourages the borough presidents to understand and care about city-wide problems so as to be able to articulate them within his or her borough. Finally, an equal vote for each borough president insures a meaningful voice for the lesser-populated boroughs. Recomposing the Board strictly according to population would reduce the president of Staten Island (and its residents) to a bystander in the Board's processes (JA 404-499). Appellees' own expert so opined (JA 166-67) as did every other expert with experience in city government (JA 444-45, 463, 510-11).[10]

But examining the many facets of the Board—each of which is supported by a rational state policy—misses a larger point. The Board has played a central role in the history of New York City. It has resolved the tension between local and regional needs and

10. It is no answer to argue that, prior to 1958, Queens, Staten Island and the Bronx had only one vote, while the other two boroughs had two. *See* pp. 12-13, *supra*. The structure of borough government as well as the Board's powers have undergone substantial changes since the state equalized the voting strength of the borough presidents. No one suggests a return to the pre-1958 formula, which would be subject to the same challenge as the present formula. And, whatever the pre-1958 arrangements, they were superseded almost thirty years ago by borough president equality which fosters collegiality and consensus. Apportionment according to population alone would destroy these dynamics.

has thus facilitated the city's growth and development. It has been able to do so because its structure gives voice to the smaller units but ultimate control to the majority. New York has a rational, legitimate interest in continuing this successful experiment.

The courts below did not respect these important state interests. They did not ask, as they were required to do, whether it could "reasonably be said that the [state] polic[ies] [are] furthered" by the Board of Estimate's voting structure. *Mahan* v. *Howell, supra,* 410 U.S. at 326. Rather the courts looked at hypothetical compositions and voting structures for the Board. If, as the District Court found, there existed a hypothetical structure which caused lesser deviations from strict voter equality, then the State's policy choices which led to the present structure had to be discarded.

The use of this "least restrictive alternative" analysis to assess state interests in local governing bodies (A38-39) is unsupported by any decision of this Court. The two cases on which the lower courts principally relied for this theory—*Karcher* v. *Daggett, supra,* 462 U.S. 725 (1983), and *Connor* v. *Finch,* 431 U.S. 407 (1977)—are inapposite. In *Karcher,* this Court held that a state must adopt the least restrictive alternative among congressional apportionment plans in order to satisfy the absolute equality standard applicable in such cases; yet in *Brown* v. *Thomson, supra,* 462 U.S. 835, decided the same day as *Karcher,* this Court did not apply that same test in the context of a state legislative apportionment plan, in which a less stringent standard of equality applies. Likewise, in *Connor,* which involved a court-imposed apportionment plan for a state legislature, this Court expressly ruled that "a court will be held to stricter standards in accomplishing its task than will a state legislature." 431 U.S. at 414. No decision of this Court purports to impose such a standard on state plans for state legislatures, let alone for local governments.[11]

11. *Kilgarlin* v. *Hill,* 386 U.S. 120 (1967) (per curiam), on which the Court of Appeals also relied in endorsing this test (A38), is especially inapposite. No reference to a least restrictive alternative test appears in that decision, which involved a Texas state legislative apportionment. This Court held there only that Texas policy frequently violated county lines and thus use of county boundaries did not justify significant deviation from voter equality. *Id.* at 123-24 and n.2.

The lower courts' ruling is also bad policy. Within the framework of majority rule and reasonable voter parity, many electoral options are theoretically available to a state in designing its local governments. This Court has repeatedly cautioned that local governments should be allowed to experiment. The point of that admonition is to permit the states substantial leeway in choosing among options. A state should thus be free to choose whichever option it regards as best-suited to its needs, provided only that the choice rests on valid policies, achieves reasonable voter parity and does not permit minority rule. To hold that a state must choose only the option resulting in the least deviation from arithmetical perfection is to eliminate the flexibility of states to adapt institutions to special situations, and transforms the equal protection clause into a "uniform straitjacket [to] bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems." *Avery* v. *Midland County, supra,* 390 U.S. at 485.

The three alternatives the court considered below—a proportional representation scheme, a residency rule, and an adjusted weighted voting system (A38-39, 101, 106-07)—highlight the danger of judicial intrusion into policy decisions involving substate governments. The proportional voting scheme—creating a 19-person board to be filled by election from single-member districts—has been explicitly rejected in past studies of city government, and precisely because the scheme would destroy all the policies the Board's structure seeks to achieve. Such a plan would eliminate the regional perspective the city-wide officials bring to the Board, expand the Board to an unwieldy size unsuited to its purposes, allow the citizens of Brooklyn and Queens alone to set city priorities, remove borough governments and presidents as unifying forces in city governance, erase the importance of the historic and geographic boundaries of the boroughs, and frustrate the city's ability to provide cohesive government.

The other alternatives likewise engage the court in second-guessing the State on how best to delegate state powers. The residency rule plan [see, *Dusch* v. *Davis, supra,* 387 U.S. at 114-15]—a scheme whereby the whole City would elect each borough president—overlooks the enormous cost of city-wide elections, the bias against members of minority groups such a plan might create, and the ability of strong political organizations in the large boroughs to control the election in other boroughs. And any revised weighted-voting plan—assigning different numerical votes to each borough president while increasing the votes of the city-wide officials—will have one of two results: Either it will give the borough presidents essentially the same voting power they have now (see pp. 33-34 *supra*); or it will interfere with the State's judgments (1) about the political accommodation needed to repose specific powers in the Board and (2) about the proper balance between local and city-wide perspectives necessary to achieve consensus on city priorities.[12]

Appellees' search for an alternate scheme is misguided. The Board of Estimate's current composition and voting system is the electoral design which best serves the State's legitimate objectives in a manner least restrictive of the voting rights of New York City residents. The State might have decided to give city-wide officials only one vote, or as we have noted, to provide for an appointive body. But the Board's present structure is instead tailored to assure majority control while paying heed to other very important state policies. At the same time, the system chosen by the State achieves reasonable parity among voters.

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12. After first claiming in the District Court that weighted voting among borough presidents was "unacceptable" (JA208), and then putting forward weighted-voting schemes as alternatives (JA565-69), appellees appear now to have suggested that adoption of any such weighted-voting scheme would violate the Voting Rights Act of 1965, §§ 2 and 5, 42 U.S.C. §§ 1973 and 1973 (c). See *The New York Times*, February 21, 1988 at B-1, col. 1. Their theory is that such a readjusted weighted-voting scheme would dilute the voting power of the presidents of the two boroughs that have elected members of minority groups to the Board. The current Manhattan Borough President is black; the Bronx Borough President is Hispanic.

In deciding whether the Board's makeup is faithful to the Constitution, a court cannot scan the universe of untested government schemes to see if another better fits New York. The State of New York is entitled to substantial deference in organizing its internal structures. The Board of Estimate's structure rests on wholly neutral and legitimate policies, assures majority rule, and does not create disparities among voters—properly computed—of greater than 31%. The record thus shows that the Board of Estimate's design "may reasonably be said to advance . . . rational state policy" and that the "population disparities among the districts that have resulted from the pursuit of this plan" do not "exceed constitutional limits." *Mahan v. Howell, supra,* 410 U.S. at 328.

CONCLUSION

When it applied the "one person, one vote" rule to local governments, this Court cautioned that the application of that rule should not serve to frustrate the ability of municipalities to fashion innovative responses to their myriad needs and responsibilities. *See, e.g., Avery v. Midland County, supra,* 390 U.S. at 485. The decisions below—in failing to consider the special nature of the Board of Estimate, in ignoring the city-wide component of representation on the Board of Estimate, and in applying a "least restrictive alternative" analysis to the policies advanced by the Board's voting structure—can serve only to place a straightjacket around local governments. The courts below struck down a local government body that achieves substantial population equality and respects majority rule while assuring strenuous representation for local concerns. If left standing, the rulings below will make it more difficult for local elected bodies to meet local needs through innovative combinations of representation. Such result should not be countenanced.

The judgment of the Court of Appeals should be reversed and the case remanded with instructions to enter judgment declaring that sections 61 and 62 of the New York City Charter are valid.

New York, N.Y.
June 13, 1988

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[illegible] COURT OF APPEALS

[illegible]

[illegible]

[illegible]

QUESTIONS PRESENTED

1. Does equal representation of five districts on a municipal governing body exercising general governmental powers under an electoral scheme that combines at large and district representatives satisfy the principle of one person, one vote when the districts range in population from 350,000 to 2,200,000?

2. In evaluating the constitutionality of a municipal apportionment scheme for a governmental body exercising general governmental powers, may a district court consider evidence of alternative electoral designs that would substantially reduce voter inequality without sacrificing legitimate governmental interests?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1022, 87-1112

THE BOARD OF ESTIMATE, *et al.*,

Appellants,

—v.—

BEVERLY MORRIS, *et al.*,

Appellees.

FRANK V. PONTERIO,

Appellant,

—v.—

BEVERLY MORRIS, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF APPELLEES

STATEMENT OF THE CASE

The Board of Estimate (the "Board") governs New York City. The Board determines whether bridges stand or fall, whether a police or fire station will be built or closed, where to site a garbage dump or incineration plant, who will be a neighbor to a homeless shelter or jail, how much the City can afford for parks and parking, which private companies will provide

express bus or cable television service and what the conditions will be for building and business in the City. The Board is the ultimate arbiter of who prevails in the economic rivalry between neighborhoods, ethnic and racial communities and competing developers and business enterprises. For most, if not all, of those with an interest in New York City—whether financial, residential or social—the Board of Estimate is *the* critical governmental institution.

Membership on the Board consists of eight officials: the Mayor, the Comptroller, the President of the City Council, and the five borough presidents. The first three are selected through citywide elections. Appellees have not challenged their selection and service on the Board. Each of the other members of the Board, however, is selected in an election limited to the residents of a particular borough. Because the boroughs vary in population from 350,000 to 2,200,000, these five members represent widely disparate populations. These disparities are at the center of this law suit.

While the boroughs have radically disparate populations, each borough president has the same voting power on the Board: one vote. Each citywide member, on the other hand, is granted two votes. This system of weighted voting means that on most issues before the Board the citywide officials wield six votes and the borough presidents together, five. In one important area of the Board's responsibility, however, this is not the case. Because the Mayor does not vote with the Board in its consideration of the City's budget and budget-related issues, the five votes of the borough presidents can dominate the four votes of the citywide officials on budgetary issues.[1] Moreover, the citywide members regularly disagree on important issues.[2]

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1 The parties stipulated that when the Board acts on the budget, representatives of 41.7% of the City's population can control a majority vote of the Board. Joint Appendix 47, 206, 509 (hereafter "JA").

2 *See* Affidavit of former Borough President and Deputy Mayor Herman Badillo, JA 246 (hereafter "Badillo") ("[D]ivision of the citywide board members occurs frequently as a result of the political reality that the Comptroller and City Council President are often engaged in an ongoing campaign for the Mayor's office."). Counsel's review of the Board votes over the past two years reveals not a single instance in which the three citywide officials were aligned against the five borough presidents. *See infra* nn.30-37.

Consequently, even when all three citywide office holders are permitted to vote at Board of Estimate meetings, Board decisions regularly depend on the voting patterns of the borough presidents.[3]

The History Of The Board

The City's presentation of the history of the Board misrepresents two key points. First, the structure of the Board was not the product of a compromise among independent municipalities that was necessary in order to achieve New York City's consolidation. Second, borough government has never existed: City government has always operated through strong, centralized institutions; it is not a regional government.

1898-1961: In 1898, the State Legislature consolidated the City of New York out of three counties and several other formerly independent municipalities. Although straw-polls with mixed results preceded consolidation, 1984 N.Y. Laws Ch. 64, the consolidation was dictated by state authority.[4] 1896 N.Y. Laws Ch. 488; 1897 N.Y. Laws Ch. 378, § 1. The former municipalities did not survive in either function or geography.

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3 For certain procedural, budget, contract and franchise issues, various super-majority requirements enhance the outcome determinative power of the borough presidents. *See e.g.* N.Y.C. Charter §§ 62(c), 65, 121(b), 223(c), 372 (Williams Press 1986), reprinted in Appendix to the Jurisdictional Statement at 230-39 (hereafter "A").

4 The 1894 N.Y. Const. art. XII, § 2 gave each of the State's cities the right to disapprove special state legislation affecting it, subject to legislative override. Pursuant to this authority, Long Island City and Brooklyn approved the 1897 charter but New York's Mayor Strong refused to ratify. The State Legislature quickly overrode his veto. Staten Island was given no ratification authority. JA 453-57; W. Sayre and H. Kaufman, *Governing New York City*, 13-14 (1960) (reprinted in part at JA 269-94, hereafter "Sayre and Kaufman").

In their place emerged a single city with a new set of geographical subdivisions—the five boroughs—and a new set of City officers, including the borough presidents.[5]

One aspect of the centralization of authority was an expansion of the role of the Board of Estimate and Apportionment, which had been created in 1864 to administer the expenses of an intercommunity police force.[6] The 1898 Charter gave the Board the power to estimate the expenses of City government, establish the tax rate and transfer funds between City departments. Kramarsky, JA 60. Membership on the Board did not include the five borough presidents. 1897 N.Y. Laws Ch. 378, § 226. In no sense, then, does the history of consolidation support the proposition that the Board's current structure is the product of a compromise or concession under which formerly independent communities agreed to centralization in return for equal representation in the organs of City government. *See* Brief of Municipal Appellants and Appellant Straniere at 8-9 (hereafter City's Brief).

In the years immediately following consolidation, Republicans and insurgent Democrats in Brooklyn chafed under a City government controlled by the Manhattan (Tammany) wing of the Democratic Party. In 1901, amendments to the City Charter simultaneously secured the place of the Board as "the center of gravity in the City's political process,"[7] and strengthened the borough presidents who, as administrative officers of the City government were given control over the delivery of certain City services. Kramarsky, JA 62-64; Borough Government Report,

5 The borough presidents had virtually no power and no role in the first City government. 1897 N.Y. Laws Ch. 378, §§ 282-391; *see also* "Borough Government Report," New York State Legislative Institute (Sept. 1973), JA 295, 301 (hereafter "Borough Government Report"); Sayre and Kaufman at 14.

6 Kramarsky, *The Structure, Powers and Functions of the Board of Estimate*, prepared for the State Charter Revision Commission for New York City (August 1973), JA 59 (hereafter "Kramarsky").

7 Sayre and Kaufman, JA 270. *See* Charo, "Designing Mathematical Models To Describe One Person, One Vote Compliance By Unique Governmental Structures: The Case of the New York City Board of Estimate," 53 Fordham L.Rev. 735, 744 (1985) (hereafter "Charo").

JA 302-05; 1901 N.Y. Laws Ch. 488 §§1544, 388. Board membership was altered to include the five borough presidents for the first time. A system of weighted voting was established roughly reflecting population disparities.[8] The citywide officials with three votes each were given a majority to guarantee a citywide perspective.[9] The borough presidents of Brooklyn and Manhattan (the most populous boroughs) were given two votes; and the remaining borough presidents, one vote. This system of weighted voting remained in place until 1958.[10]

From 1924 to 1938 the Board was officially the upper house of the City legislature. 1924 N.Y. Laws Ch. 363. In 1938, a new charter reduced the powers of the borough presidents individually and of the Board collectively. Kramarsky, JA 67-69. The Board lost the power to initiate, although not the power to approve, municipal legislation. Borough Government Report, JA 306; Kramarsky, JA 67. Still, the Board retained its position as the key actor in City government, maintaining, in addition to its direct legislative authority, its control of City resources and of development in the City. It also remained the final voice on all major municipal controversies and financial issues.

1962-1988: Nineteen sixty-two was a watershed year in the century-long trend toward centralization of City government. A new charter took effect that stripped the borough presidents of virtually all their remaining administrative functions. The only significant formal power retained by borough presidents derived from their seats on the Board; the other powers of office were either advisory or aspects of the "community advo-

8 *Report of the Charter Revision Commission* at 19 (1900) ("[I]t was not thought just to give to the representatives of the smaller boroughs an equal vote . . . .") (hereafter "Charter Revision Report") (lodged with the Clerk's Office).

9 Charter Revision Report at 19 ("It . . . seemed essential that the total voting power of the five Borough Presidents should be less than that of the officers elected from the City at large.").

10 1958 N.Y. Laws Ch. 719. *See also* Kramarsky, JA 70. In 1958, votes on the Board were redistributed: Each borough president was given two votes and each citywide official, four.

cate'' role. Borough Government Report, JA 311-330; Kramarsky, JA 72-73.

While individually the borough presidents lost power, the Board itself remained at the center of City government.[11] It retained its legislative role in budgetary decisions, as well as its control over zoning and over the disposition of all City property, franchises and contracts. Kramarsky, JA 72. In addition, it approved the standards, scope, and final design of all capital projects. *Id.* Moreover, as federal appropriations for housing and community development grew, the Board's role as shaper of the City's development grew. Badillo, JA 243-45.

Charter revisions approved in 1975 further expanded the Board's power in relation to the City's budget. N.Y.C. Charter §§ 121(b), 223(c). Simultaneously, these revisions enhanced the power of the borough presidents on the Board by excluding the Mayor from voting when the Board acts on the budget. N.Y.C. Charter §§ 120(d), 222(c).

In sum, the Board has always been and continues to be the City's predominant institution of centralized government.[12]

The Responsibilities Of The Board

The Board's functions are a mix of legislative and executive tasks. Its power over the budget of New York City, for example, is typically "legislative."[13] The Board, acting without the

11 In 1973, the Kramarsky Study concluded: "[T]he Board of Estimate has retained its position of primacy in the city government." JA 74.

12 Sayre and Kaufman, JA 294 ("On the chessboard of the city's politics, the Mayor may be king, but the Board of Estimate is queen.").

13 An array of powers granted to the Board by the State Legislature—including its power over land use, franchising, and zoning—are elsewhere in the State granted to municipal legislative bodies. N.Y. Gen. City Law §§ 26, 29, 37, 23(2)(b), 23, 20(24), 20(25), 87 (McKinney 1968). *See also* N.Y. Gen. Mun. Law §§ 72-h (transfer public lands), 119-u(d)(2) (intermunicipal cooperation), 241 (dedicate land for playgrounds), 242 (determine control of

Mayor, has the same budgetary functions as the City Council. N.Y.C. Charter §§ 121(b), 223(c). Together, they act as a bicameral legislature in determining the City's expense and capital budgets. The Board holds regular hearings on the budget, during which commissioners of various Mayoral agencies must justify their proposed budgets and report on their recent activities and administration, just as executive agencies everywhere report to legislative bodies.

The Board's non-budgetary authority is equally far-reaching. It must approve the franchise or lease of any City property; it has final decisionmaking authority over all development within the City through its unbridled zoning authority; and it controls the standards, scope and design for all capital projects. N.Y.C. Charter § 67. The Board also controls five billion dollars of City contracts per year.[14] Its fiscal responsibilities include setting sewer and water rates, granting tax abatements, which are critical to the development of business enterprises in economically depressed areas, and allocating property taxes in urban development projects. N.Y. Gen. Mun. Law §§ 692, 970-a–970-q (McKinney 1986); N.Y.C. Charter § 67(7).

While extensive, this list of formal powers hardly describes the Board's actual power within City government. For example, although the Board does not formally establish the City's tax rates, it has a significant impact on those rates through its cumulative powers to control revenue from land use and franchises, to authorize City spending and to grant tax abatements. Even enforcement of City Council ordinances is dependent upon the Board's allocation of sufficient resources to fulfill the

playgrounds), 243 (establish recreation commission), 290 (establish facilities for elderly), 692 (establish urban development action areas), 970-c (approve tax increment financing) (McKinney 1986); N.Y. Gen. City Law §§ 20(29) (enter contracts for health insurance), 24-c(e) (establish business improvement districts) (McKinney 1968); N.Y. Educ. Law §§ 255 (establish public libraries), 2556(9) (authorize use of surplus education money), 4604 (create literacy programs) (McKinney 1961); N.Y. Parks Rec. & Hist. Preserv. Law § 35.05(3) (approve development of urban cultural parks) (McKinney 1984).

14 Office of the New York State Comptroller, "Reforming the Contract Process in New York City," Report No. 17-87 (Sept. 11, 1986) at 3.

Council's legislative promises. As history has demonstrated and as the Nation's constitutional framers understood, the power to control the purse translates into the power to control the aims and effectiveness of government. In New York City, the Board has the power of the purse.

The Board Of Estimate Is An Instrument Of Centralized City Government, Not A Regional Arrangement

Elsewhere in New York State, regional government exists in the form of county governments, which address concerns that cross municipal boundaries.[15] *See Town of Lockport v. Citizens for Community Action*, 430 U.S. 259, 260-72 (1977). No analogous regional structure exists in New York City, which has only a single level of local government.[16] The governmental powers

15 Before *Reynolds v. Sims*, 377 U.S. 553 (1964), each county was governed by a board of supervisors consisting of the elected supervisors of the county's towns. Each town supervisor exercised an equal vote on the county board, regardless of the population he or she represented. N.Y. County Law § 150, *et. seq.* After *Reynolds*, this voting scheme was held unconstitutional. *See* Weinstein, "The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government," 65 Col.L.Rev. 21, 40-49 (1965); *Iannucci v. Bd. of Supervisors*, 20 N.Y.2d 244, 249 (1967). Each of the 57 counties outside of the City reconstituted its board through the use of single or multimember districts, *see Abate v. Mundt*, 403 U.S. 192 (1971), or weighted voting schemes. *Iannucci, supra. See* N.Y. Mun. Home Rule Law, § 10(1)(a)(13) (McKinney 1988 Supp.).

16 In 1973, the Wagner Commission noted:

> Governmentally, New York City is unique in the State . . . . [T]here are no subordinate nor superior levels of government in New York City which consists of five counties but has no county government. The five boroughs are geographical rather than administrative units.

Strengthening Local Government in New York: Summary, Temporary Commission on the Powers of Local Government at 13 (lodged with the Clerk's Office). *See also* N.Y.S. Dep't of State, *Local Government Handbook* (4th ed. 1987) at 59 ("The five boroughs of the City of New York are vestigial counties for certain purposes, although they are not organized as such nor do they operate as county governments.").

distributed between counties and municipalities in the rest of the State all fall within the City's centralized municipal government.[17]

Thus, borough presidents do not sit on the Board as representatives of independent local governments. The boroughs simply do not exist as governmental units. In fact, the City Charter denominates the boroughs as City agencies. N.Y.C. Charter § 1150(2).[18] The borough president is the sole borough official and he or she has only one source of power: the vote on the Board. Without subordinate governmental units, City government may be large but it is not "regional."

Furthermore, the relevance of borough boundaries in general has substantially diminished.[19] Their importance as geographical divisions has been undermined by the ease of interborough movement provided by modern mass transit, as well as by the distinctiveness of local communities within each of the four large boroughs. Few New Yorkers use borough boundaries to identify their home and work communities. Rather, they con-

17 The State has vested all local powers in the City, whereas elsewhere these powers are divided between county, city, town and village governments. N.Y. Mun. Home Rule Law §§ 1(a), 1(h)(1), 2(b)(2)(b), 3(d)(2) (McKinney 1969); JA 430-49; *see also* N.Y. County Law § 2(a) (McKinney 1972); N.Y. Gen. Mun. Law § 99-e(1) (McKinney 1986); N.Y. Local Fin. Law § 106.00(a) (McKinney 1968); *see* N.Y. Const. art. IX, § 1(h) & art. XIII, § 13; N.Y. Exec. Law §§ 256(7), 331(3), 357 (McKinney 1982); *compare* N.Y. Const. art. VIII, § 9 with art. IX, § 1(a).

18 The N.Y. State Constitution never mentions "boroughs," though it makes countless references to the State's local governmental units: counties, cities, towns and villages. *See e.g.* N.Y. Const. art. IX, § 3(d)(2); art. VIII, art. VI, art. XVIII; *see also* N.Y. Gen. Constr. Law § 66(2) (McKinney 1988 Supp.); N.Y. Stat. Local Gov'ts § 3(d)(2) (McKinney 1969); N.Y. Mun. Home Rule Law § 2(8) (McKinney 1969) (definition of "local government" and "municipal corporation" does not include "borough").

19 There have been no borough taxes since 1922. 1922 N.Y. Laws Ch. 58. And since 1961 all taxes have been citywide. *See* N.Y.C. Charter §§ 1515-1516(a).

sider themselves either residents of the City in general, or of local, sub-borough communities—or perhaps both.[20]

Increasingly, the centralized government of the City operates directly on and through these sub-borough communities. Starting in 1977, the City established an active community district system designed to represent neighborhoods and stimulate local community life. City services and planning are organized around 59 community districts, rather than five boroughs. Community planning boards in each of these districts have been established as an alternative to, not an example of, borough government.[21]

Although the borough presidents are the representatives of community needs, they have no final decisionmaking authority over the proposals of these various community boards. Only as members of the Board of Estimate can the borough presidents rule on those decisions. Thus, to the extent that the borough president participates in decisions about local communities, he or she does so as a member of the Board—as a member of an institution of centralized City government—not as chief executive of something that the City attempts to identify as "borough government."

Equal Representation Of Boroughs On The Board Has Substantially Advantaged The Smaller Boroughs

New York City has more people than 41 states. Its budget is exceeded only by that of California and New York State. Considered by itself, Brooklyn would be the nation's fourth largest city; it is larger than 17 states.

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20 The diversity of community interests within the boroughs is reflected, for example, in the fact that City Council members from different districts within the same borough regularly disagree. *See* "Borough Representation," Citizens Union Foundation Report to the New York City Charter Revision Commission at 58-60 (March 1988) (lodged with the Clerk's Office); *see also id.* at 34-37 ("Survey: How New Yorkers See Themselves").

21 N.Y.C. Charter § 2700 commits the City to the use of community districts for the delivery of services and City planning. It specifically recognizes that reliance on other geographic districts "impeded" delivery of services and citizen involvement. *See* N.Y.C. Charter § 2701(b) for the criteria for the designation of community districts.

Brooklyn, like the other large boroughs, is comprised of many distinct communities.[22] Many of these communities are as populous as Staten Island, and like Staten Island, have identifiable common interests. Unlike Staten Island, however, within the large boroughs, local community interests are likely to clash with one another. Brooklyn, for example, has 18 community districts and Staten Island only three. The borough president of Brooklyn will far more often have to choose among the community interests he or she will represent on the Board than the borough president of Staten Island.

The sharpest and clearest measure of the disparity of representation of "local" interests on the Board is the electoral power granted Staten Island. With only 350,000 residents, Staten Island remains small and relatively homogeneous.[23] No other similarly situated community, measured in terms of population and demographics, is similarly represented on the Board. No other "local" community is represented on the Board at all. Instead, other local communities in a city of neighborhoods must compete with each other to influence their single representative.[24]

The preferred political status of Staten Island has translated into the power to claim and receive a disproportionate share of the City's resources. For instance, the City's Expense Budget for 1988-89 provides Staten Island's borough president a larger administrative office budget ($5.1 million) than the borough president of Manhattan ($4.8 million).[25] Staten Island's $5.1

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22 *Demographic Profile: A Portrait of New York City*, Dep't of City Planning (Dec. 1983).

23 Affidavits of Marchi, JA 444-46; Tobier, JA 264-68; Trautman, JA 479-89; Jaffe, JA 490-97; *see Community District Needs: Fiscal Year 1989, Staten Island*, The City of New York (Oct. 1987) (lodged with the Clerk's Office).

24 As former Borough President and Deputy Mayor Herman Badillo, City Council representative Wendell Foster and former Chairman of the City Council Budget Committee Edward Sadowsky describe, a borough president simply cannot represent the multiplicity of conflicting communities which comprise each of the large boroughs. JA 240-56.

25 *Fiscal Year 1989 Adopted Board of Estimate and City Council Changes* at 8-12 (June 30, 1988) (lodged with the Clerk's Office).

million is close to the amount received by Brooklyn and Queens ($5.8 million). Furthermore, the second smallest borough, the Bronx, is to receive the largest amount ($6.6 million). This is the budget that finances all constituent services. In dollars per constituent, Staten Island receives $14.43, Brooklyn, $2.61, Queens, $3.08, Manhattan, $3.39 and the Bronx, $5.66. These figures directly correspond to the inverse of population size, with the largest boroughs receiving the least.

The same inverse relationship appears in the funding of public service programs. In fiscal 1989, Staten Island will receive $1,886,690; Brooklyn, $3,969,200; Queens, $3,979,000; Manhattan, $3,430,896; and the Bronx, $3,144,060.[26] This means that Staten Island will receive $5.36 per person, Brooklyn, $1.78, Queens, $2.10, Manhattan, $2.40 and the Bronx, $2.69.[27]

Similar disproportions appear in capital spending. The following table compares Staten Island to three demographically similar community districts of slightly greater combined population in Queens, and three much poorer community districts of slightly less population in Brooklyn.[28] Staten Island's preferred position is again evident:

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26 *Id.* at Appendix, "1989 Budget Adoption; Staten Island, Brooklyn, Queens, Manhattan, Bronx."

27 Such disproportionate distributions of public service program funding are not new. Typically, each borough received an *equal* amount. "Seven Million Given Borough Chiefs Upsets City Hall," *New York Times*, June 19, 1984, at B1 ("[The Mayor] said there was no way to block the demand because he could not vote on budget matters.").

28 Detailed demographic comparisons of Staten Island with Queens Community Districts 8, 11 and 13 and Brooklyn Community Districts 3, 4 and 16 appear at JA 268.

Capital Budget Comparisons[29]

Neighborhood	Population	Total Estimated Cost of Line Item Projects	Total Line Item Appropriations Through Fiscal Year 1983	Fiscal Year 1984 Adopted Capital Budget
Staten Island CDs 1, 2, 3	351,863	$586,573,000	$289,581,000	$74,163,000
Brooklyn CDs 3, 4, 16	300,444	225,429,000	68,354,000	16,723,000
Queens CDs 8, 11, 13	409,534	361,606,000	114,846,000	47,989,000

The disproportionate power of Staten Island on the Board is not limited to its access to a disproportionate share of City resources. Staten Island's borough president participates as an equal to the other district representatives in all of the decisions that come before the Board. For example, in 1984, the Board decided by a six to five vote to place an incineration plant at the Brooklyn Navy Yard. The majority coalition consisted of the Mayor and the four borough presidents other than that of Brooklyn.[30] Similarly, last year the Board by a six to five vote approved a plan that would place only one homeless shelter in Manhattan and no shelters in Staten Island, while locating 10 shelters in the other boroughs. The Mayor, City Council President and Borough Presidents from Manhattan and Staten Island formed the winning coalition.[31] Later last year, the same coalition swept aside community opposition to subsidized

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29 This material was presented in courts below and not contradicted by the City. *See* Appellees' Brief in the Second Circuit (March 23, 1987) at 30 (data from *Fiscal Year 1985: Statements of Community District Needs*, New York City Office of Management and Budget).

30 "Approval is Given for Incinerator at Brooklyn Site," *New York Times*, August 16, 1985, at A1; *see also* Joint Appendix in the Second Circuit at 868.

31 "Board Approves Plan for Shelter," *New York Times*, August 20, 1987, at A1; "Homeless, Politicians and a Deal," *New York Times*, August 22, 1987, at A29.

middle-income condominiums in the Bronx.[32] If these votes on the Board had been weighted proportionately to population, the losers in these controversies would have prevailed.[33]

The City responds to the disproportionate power wielded by the residents of Staten Island by pointing to the history of unanimity within the Board.[34] This public unanimity however, does not reflect the real divisions on the Board. The Board operates under a custom of public unanimity, which conceals the real decisionmaking that occurs largely in private. Sayre and Kaufman refer to the Board's consistent policy of "avoid[ing] any public revelation of division within its membership."[35] JA 282. Similarly, former Borough President Herman Badillo describes "unanimous votes [as] by no means reflective of the divisions on the Board." JA 245. Within these secret negotiating sessions, no other group of 350,000 residents has the same power as Staten Island.

On many important City issues, moreover, public unanimity breaks down. The Brooklyn Navy Yard incineration plant,

32 "New York Approves Plan to Build 750 Apartments for Middle Class," *New York Times*, November 21, 1987, at A1.

33 Appellees do not suggest that a weighted voting scheme is the only alternative to the present Board system. It is, however, an alternative considered by the lower courts and widely used in New York State. JA 561-69.

34 The City asserts that 97% of Board votes are unanimous. City's Brief at 13-14. This figure conceals the large proportion of procedural and routine votes. Because Board calendars average at least 300 to 400 items every two weeks, most items are disposed of on a *pro forma* vote, conducted in the absence of actual Board members. JA 93; "Bit Players Stand in for Elected Stars on the Board of Estimate's Stage," *New York Times*, June 29, 1984, at B1 (reprinted in Joint Appendix in the Second Circuit at 905-06).

35 Sayre and Kaufman, JA 284-85 ("When agreement proves difficult, the Board will usually clear the room of all nonmembers and then proceed to a bargained adjustment of their differences or to an agreement to deal . . . . [A]ll members . . . subscribe increasingly to the caucus objective of private bargaining followed by public unanimity."). This system of backroom negotiations continues to this day. *See* "Dinkins Plays a Strong Role in Borough Job," *New York Times*, September 2, 1986, at B1; "Homeless, Politicians and a Deal," *New York Times*, August 20, 1987, at A1; "Three Officials Sue Koch on Shelters," *New York Times*, November 20, 1987, at B1; "New York Approves Plan to Build 750 Apartments for Middle Class," *New York Times*, November 21, 1987, at A1.

homeless shelters and subsidized condominiums, are some examples. *See supra* at 13-14. A Chinatown jail (approved seven to four), a renewal project for the South Bronx (rejected seven to four), a plan to convert abandoned Manhattan housing into cooperative apartments (approved six to five), a Manhattan development (approved six to five), and a plan for homeless shelters in Bedford-Stuyvesant and Harlem (rejected seven to four and nine to two, respectively) are others.[36] When public divisions occur—and they occurred in 382 instances in 1987—they invariably include divisions among the citywide officials.[37]

The Proceedings Below

Appellees brought this action in December, 1981. One year later, the District Court dismissed the complaint on the grounds that "the Board . . . is not an elected body." A 222. The Second Circuit Court of Appeals reversed, holding "that the Board of Estimate is selected by popular election and performs general governmental functions." A 200. Notably, in the course of this first appeal, the City conceded that

> [i]f the one person, one vote requirement is applied to the Board of Estimate, defendants would agree that the allocation of votes among the borough presidents should be based upon the population of the borough.

City Appellees' Brief in the Second Circuit (March 21, 1983) at 2.

36 "Jail Near Chinatown Is Approved by 7 to 4 By Board of Estimate," *New York Times*, December 3, 1982, at A1; "$250 Co-op Plan, With Condition, Voted," *New York Times*, November 19, 1982, at B2 (reprinted in Joint Appendix in the Second Circuit at 257, 260); "Dinkins Plays a Strong Role in Borough Job," *New York Times*, September 2, 1986, at B1; "Koch Proposals to Convert Two Buildings to Shelters Are Rejected," *New York Times*, March 12, 1988, at A36; "Estimate Board Defeats Koch Plan on East Harlem Homeless Shelter," *New York Times*, December 18, 1987, at B1; Badillo, JA 243-45.

37 *Supra* n.2; Sayre and Kaufman, JA 277-80, 287, 289-91, 293-94. Of the 382 divided votes in 1987, the Mayor and the Comptroller divided in 310 instances. *See also* "Koch and Goldin: The Feud Gets Down to Basics," *New York Times*, July 28, 1988, at B1.

On remand, Plaintiffs moved for summary judgment and all parties stipulated that the case should proceed upon undisputed facts as developed through affidavits and exhibits.[38] The District Court issued two opinions in a bifurcated proceeding. In the first, it concluded that there was a total deviation of 132.9% from voter equality among the boroughs.[39] A 163. In the second, it concluded that while the City's interests in maintaining "natural boundaries" and the "integrity of political subdivisions," promoting "effectiveness," providing "meaningful representation to smaller boroughs in board affairs" and "checking the mayor and supplementing the City Council" were legitimate municipal concerns, they were not served by the Board voting scheme. A 85-97. Furthermore, it held that "alternatives have been suggested that would 'substantially vindicate' the acceptable policies and interests 'yet approximate population equality more closely.' " A 109 (citation omitted).

The Second Circuit Court of Appeals affirmed both aspects of the District Court's decision.[40] A 5-47.

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38 Appellant Ponterio now asserts that summary judgment was improperly granted. Brief of Appellant Ponterio at 31 (hereafter "Ponterio Brief"). Ponterio himself specifically agreed to proceed without a hearing in the District Court. JA 399-403.

39 This figure was based upon application of the methodology employed in *Abate v. Mundt*, 403 U.S. 182 (1971). Comparing the actual population of each borough with the average borough population of 1,414,206, produces a total deviation of 132.9%:

Borough	*Population*	*Deviation from the Average*
Brooklyn	2,230,936	- 57.7%
Queens	1,891,325	- 33.7%
Manhattan	1,427,533	- 0.9%
Bronx	1,169,115	+ 17.4%
Staten Island	352,121	+ 75.2%

40 In response to the decisions below, the Mayor appointed a Charter Revision Commission. The Chairman of the Commission, numerous civic groups and several members of the Board of Estimate have presented plans to the Commission for addressing the one person, one vote requirement. The plans under consideration include proposals for reapportioning the Board, eliminating it, utilizing weighted voting and removing most of its general governmental powers.

SUMMARY OF ARGUMENT

The Board of Estimate is the most important government institution in New York City, exercising a variety of legislative—including budgetary—and executive powers. Despite the fact that the Board exercises "general governmental powers" over the entire City, and serves as the second house of a bicameral legislature on many issues, it has never been reapportioned on the basis of population. Since 1901, it has based elective representation on political and geographic subdivisions: the boroughs. These subdivisions range in size from Staten Island with 350,000 residents to Brooklyn with 2,200,000. Staten Island, with one-sixth the population of Brooklyn, exercises the same power and influence on the Board as each of the other boroughs.

The lower courts found a 132.9% disparity from population equality among the boroughs. The City challenges this finding by offering a purely theoretical and highly controversial mathematical model for calculating voting power. The City urges this Court to turn from a concept of voter equality that emphasizes participation in the electoral process to one that emphasizes voter control over decisionmaking within a government institution. No court has ever accepted the City's methodology and, more importantly, this Court has already rejected it. *Whitcomb v. Chavis*, 403 U.S. 124, 145-46 (1971). The City's model is unfounded in fact, flawed in theory and entirely too complex. The difficult mathematics it requires could neither be understood by the citizens whose rights are at issue nor accurately applied by lawyers and courts. Finally, in this case the City's model produces too little: Its application here yields a deviation far larger than any this Court has ever approved.

To determine voter power the City's methodology relies on a theoretical aggregation of representatives elected at large with

representatives elected from single-member districts. This approach is an attempt to mitigate the substantial population differences among the single-member districts. But the lower courts found, and the City has conceded, that the at large and district representatives serve different functions and respond to different political forces. Neither evidence in this case, nor reasons of political theory, suggest that the at large members actually align themselves with the interest of the larger boroughs. To the contrary, the City's budget allocations demonstrate that the smaller boroughs have been able to achieve a disproportionate influence and receive a disproportionate share of the City's resources.

In an attempt to justify the tremendous population disparities among Board districts, the City relies principally upon an argument that New York City is a "regional government." New York City, however, has a typical, centralized—not a regional—governmental structure. Borough government does not exist. The borough presidents have power only as members of the Board. While they represent local interests on the Board, "local" cannot mean 350,000 people in one district and 2,200,000 in another.

The lower courts did not apply a "least restrictive alternative" test. Rather, the District Court noted that there were reasonably available alternatives that would substantially reduce the population disparities and simultaneously satisfy all of the City's legitimate interests. As this Court has made clear, unless a district court is free to examine alternative electoral systems, it cannot evaluate the strength of governmental interests in a challenged apportionment scheme. The lower courts did not require or even suggest that the City had to pursue any one of these alternatives; rather, they recognized that redesigning the Board is a legislative task.

ARGUMENT

New York City does not dispute that Board members are popularly elected and that the Board exercises "general governmental powers over the entire geographic area served." *Avery v. Midland County Commissioners' Court*, 390 U.S. 474, 485 (1968). Despite the clarity of this Court's rulings on the application of the principle of "one person, one vote" to elective institutions of municipal government, the City has yet to make even a first step toward reapportioning the Board on the basis of population. Rather than defend a good faith effort to achieve voter equality, the City argues for the right of its smallest borough to be elevated to a privileged status.

The Board continues to govern New York City just as if this Court had never decided *Reynolds v. Sims*, 377 U.S. 533 (1964), and a host of other reapportionment cases over the past 25 years. Just as this Court held that the New York City Council had to respect the constitutional mandate of one person, one vote, *Andrews v. Koch*, 528 F.Supp. 246 (E.D.N.Y. 1981), *summ. aff'd*, 688 F.2d 815 (2d Cir. 1982), *aff'd sub nom., Giacobbe v. Andrews*, 459 U.S. 801 (1982), it should hold that the Board, which itself exercises legislative powers and acts in important respects as the coordinate house of a bicameral legislature with the City Council, must respect this constitutional rule.

I.

Municipal Government Must Meet Well-Settled Criteria Of Voter Equality

As state-created entities, municipalities draw their authority and their constitutional responsibilities from state legislative power:

> We . . . see little difference, in terms of the applications of the Equal Protection Clause and of the principles of *Reynolds v. Sims*, between the exercise of state power through legislatures and its exercise by elected officials in the cities, towns and counties.

Avery v. Midland County, 390 U.S. at 481. Thus, the starting point for a system of apportionment is the same for both state and municipal government:

> [T]he constitution imposes one ground rule for the development of arrangements of local government: a requirement that units with general governmental powers over an entire geographic area not be apportioned among single member districts of substantially unequal population.

Id. at 485-86.

This "ground rule" has evolved into two subrules. First, there is an absolute limit to population inequalities among electoral districts, regardless of the strength of countervailing justifications. Second, the peculiar problems of local government—including the judicially noted need for "flexibility"—will be considered in a case-by-case evaluation of the justifications offered in defense of population inequality. The Board satisfies neither of these subrules.

A. The Deviations From Voter Equality Among The Board Districts Are Per Se Unconstitutional

That there must be a limit beyond which quantitative deviations from the right to an equal vote cannot be overcome by other state ends is implicit in the fundamental premise of the Court's modern apportionment jurisprudence:

> [T]he overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State.

Reynolds, 377 U.S. at 579. This simply could not remain the "overriding objective" if population equality could always be displaced by other state ends. Accordingly, the Court has tempered its openness to countervailing justifications with a warning that the place of those justifications is necessarily limited:

> [A] State's policy urged in justification of disparity in district population, however rational, cannot constitutionally

> be permitted to emasculate the goal of substantial equality.

Mahan v. Howell, 410 U.S. 315, 326 (1973); *see also Connor v. Finch*, 431 U.S. 407, 419 (1977); *Brown v. Thomson*, 462 U.S. 835, 849-50 (1983) (O'Connor, J., concurring).

While the Court has never said "exactly so far, and no further," *see Mahan*, 410 U.S. at 329, there is no longer much doubt about the range of permissible variations. This Court has never upheld a state or local electoral scheme, regardless of the justifications offered, with a deviation from voter equality of more than 17%. On several occasions, the Court has expressed extreme doubt that deviations much above that level could survive in any situation. For example, in *Kilgarlin v. Hill*, 386 U.S. 120, 123 (1967), the Court rejected an apportionment plan for the Texas House of Representatives that contained a 26% deviation:

> We are doubtful . . . that the deviations evident here are the kind of "minor" variations which *Reynolds v. Sims* indicated might be justified by local policies counseling the maintenance of established political subdivisions in apportionment plans.

Lower percentage deviations have been accepted, but with stern warnings that they were approaching the constitutional limits. Thus, in *Mahan*, the Court accepted the justifications offered for a 16.4% deviation, but warned that "this percentage may well approach tolerable limits." 410 U.S. at 329. Similarly, the Court warned that its acceptance of the justifications offered for an 11.9% deviation in a county government scheme should not be interpreted as an invitation to test yet higher deviations. *Abate v. Mundt*, 403 U.S. 182, 187 (1971) ("[N]othing we say today should be taken to imply that even these factors could justify substantially greater deviations from population equality.").

The Court's treatment of quantitative variations in state and local apportionment plans has resulted in three clear ranges or categories of percentage deviation. *See generally Gaffney v. Cummings*, 412 U.S. 735, 744-45 (1973). Below 10%, popula-

tion deviations from numerical equality in state and local apportionment schemes are considered *de minimis*. *White v. Regester*, 412 U.S. 755, 764 (1973). Deviations from 10% to about 17% may, under some circumstances, be justified. Above that, deviations are impermissible. They must be, if the rule of one person, one vote is to remain a constitutional requirement and not just one among a variety of policies that a state or local government may choose to implement through its apportionment plan.

These ranges have been well understood by the lower courts. In the period from 1969 to 1982, every local apportionnent scheme with variances higher than 10% was struck down with two exceptions.[41] Of the two exceptions, one was at 10% and the other at 40%. The latter involved the electoral districts for the board of a small Pennsylvania school district. *Adams v. School Bd. of Wyo. Valley W.*, 332 F.Supp. 982 (M.D.Pa. 1971). The result was clearly aberrational and has not been followed by any other court. Since 1982, only *Brown v. Thomson*, 462 U.S. 835 (1983), could have suggested a relaxation of the rule on permissible deviation. But no lower court has relied on *Brown* to uphold an apportionment scheme with a deviation greater than 11%. *See McBride v. Mahoney*, 573 F.Supp. 913 (D.Mont. 1983) (upholding 10% deviation in state legislative redistricting plan).

In response to these clear numerical guidelines, the City asserts two propositions: first, that a different and less strict rule applies to local, as opposed to state, apportionment plans; second, that *Brown* upheld a state apportionment scheme with a substantial population deviation. Both propositions are wrong.

To be sure, the Court has suggested that somewhat larger population deviations are allowed at the local and state levels than would be permissible for congressional districts. But nowhere has the Court ever suggested that substantial population inequalities would be permissible. In the very case that the City cites in support of this proposition, *Abate v. Mundt*, 403 U.S. 182 (1971), the Court emphasized that the greater need for

41 *See* Dodge and McCauley, "Reapportionment: A Survey of the Practicality of Voting Equality," 43 U.Pitt.L.Rev. 527, 566 (1982).

flexibility in local government structure could only "lend support to the argument that *slightly* greater percentage deviations may be tolerable for local government apportionment schemes." *Id.* at 185 (emphasis added). *Abate* itself involved a population deviation of 11.9%, or less than one-tenth the size of that on the Board, and still the Court suggested that it was near the limit.[42]

Similarly, the City vastly exaggerates the significance of *Brown*. In *Brown*, plaintiffs had narrowly cast their case in order to challenge just one aspect of the state apportionment scheme: the assignment of a separate representative to the least populated county. They specifically were not making a challenge to the scheme's state-wide population deviations:

> Here we are not required to decide whether Wyoming's nondiscriminatory adherence to county boundaries justifies the population deviations that exist throughout Wyoming's representative districts.

462 U.S. at 846. Indeed, Justice O'Connor's critical concurrence made entirely clear that the Court did not approve the state apportionment scheme:

> I have the gravest doubts that a statewide legislative plan with an 89% maximum deviation could survive constitutional scrutiny despite the presence of the State's strong interest in preserving county boundaries.

Id. at 850. If the constitutionality of the plan remained an open question, then it can hardly be inferred that the Court approved the 34% incremental deviation described by the City.[43] Properly

42 Because *Abate* was decided before *Mahan*, in which the Court made clear that a less exacting standard of equality applies to state, as opposed to congressional, electoral districts, the reference to "slightly greater percentage deviations" in *Abate* was in contrast to the severe mathematical standard of equality affirmed in *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), and *Wells v. Rockefeller*, 394 U.S. 542 (1969). Thus, in *Mahan*, *Abate* is cited not as a case about the standards applicable to municipal government as a special category, but rather about those applicable to state government in general. 410 U.S. at 322.

43 The City reaches this figure by calculating the percentage increase in population deviation created by allowing the least populated district to have

read, *Brown* approved only *de minimis* variations in voter strength. Thus, the deviations at issue here are far beyond the limits that the Court has suggested might permissibly exist even if properly justified by legitimate state policies, and they are far beyond the standards that have been routinely followed by the lower courts.

This conclusion follows regardless of the mathematical model used to calculate the deviation from voter equality among the districts. While Appellees believe that the lower courts properly found a 132.9% deviation, other methods of calculation produce equally unacceptable results. For example, application of the voter power analysis that the New York State courts apply to county government schemes yields a 338% deviation. *See* Charo, *supra* n.7 at 790.[44] Allocating at large members to the boroughs on the basis of borough population—an allocation which the lower court properly rejected—produces a 78% deviation. *See* Stipulation on Summary Judgment, JA 47, 206; A 163. Only the City's methodology reduces the deviation to 30.8%.[45] While that number is twice the deviation ever approved by this Court, we show below that the City's methodology is wholly inappropriate and produces results completely incomparable to the calculations in the Court's prior cases.

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its own representative. City's Brief at 40. In fact, the incremental deviation approved in *Brown* was of a completely different order of magnitude: "The District Court noted . . . that the seven counties in which appellants reside will elect 28 representatives under either plan. The only difference, therefore, is whether they elect 43.75% of the legislature (28 of 64 members) or 44.44% of the legislature (28 of 63 members). The District Court aptly described this difference as '*de minimis.*' " 462 U.S. at 847 (citation and footnote omitted).

44 Charo also explores in detail the wealth of alternative mathematical models which lead to deviations measuring from 153.07% to 76.33%—all well beyond acceptable limits.

45 Appellant Ponterio uses a weighted voting methodology to conclude that there is only a 12% deviation. However, he misapplies the methodology by failing to calculate the population deviation as a percentage of "normal" voting power. Properly calculated, the deviation is 338%. *See* Charo, *supra* n.7 at 790. Notably the City's methodology yields a 49.36% deviation on budget matters where the Mayor does not vote.

B. The Abstract Mathematical Methodology Offered By The City Is Unprecedented And Unwarranted

While this Court does not normally review district court findings of fact upheld by a circuit court, the City focuses its argument on the lower courts' finding of a 132.9% population deviation among Board electoral districts. *Cf. Mahan v. Howell*, 410 U.S. at 319 n.6 ("We decline to enter this imbroglio of mathematical manipulation and confine our consideration to the figures actually found by the [lower] court and used to support its holding of unconstitutionality."). Before the District Court, the City argued that only a qualitative, and not a quantitative, analysis should be used in evaluating the Board's scheme of representation. A 139. In its brief on appeal, however, it offered a new and immensely complex methodology for measuring deviations from voter equality. Having moved from one extreme to the other, the City now pursues its effort at "mathematical metaphysics" in this Court. A 131. The City's efforts, however, continue to miss the constitutional measure of equality.

This Court has settled on a clear and simple method of quantifying citizen voting power based upon a comparison of the populations of the smallest and the largest districts—Staten Island (352,121) and Brooklyn (2,230,936)—to the "ideal" or average district (1,414,206). This comparison is captured in the lower courts' finding of a 132.9% deviation. This is a realistic expression of the fact that Brooklyn is six times larger than Staten Island, yet they have equal representation.

In its attempt to conceal the differences in district size, the City advocates an approach that combines borough representation on the Board with citywide representation and calculates voter strength on the basis of a theory already rejected by this Court as "unrealistic." This approach was properly rejected by both courts below.

1. The Seating Of At Large Board Members With The Borough Presidents Does Not Mitigate The Population Disparities Among The Districts

In its reversal of the District Court's initial holding that the one person, one vote rule does not apply to the Board, the Circuit Court remarked:

> [T]he fact that three members of the Board are elected at large from the entire city raises novel issues as to how an individual voter's opportunity to elect these members should be assessed in conjunction with his opportunity to elect his borough representative.

A 207. On further reflection, the lower courts concluded that the issues were not "novel" and that it was appropriate to exclude the at large members from the calculation of district malapportionment.[46] The common-sense strength of this position is obvious. All residents of the City are treated alike insofar as they participate in the election of the at large members. Only in the selection of their district representatives are they treated differently. The constitutional claim begins where the inequality begins. Furthermore, any attribution of a share of the at large representation to particular boroughs would be wholly arbitrary because citywide politics responds to different issues and voter coalitions than does borough politics. This common-sense view is fully supported by the law and the facts of this case.

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46 The District Court relied, in part, on extensive precedent for separately evaluating the apportionment of borough presidents. It cited *Latino Political Action Committee, Inc. v. City of Boston*, 568 F.Supp. 1012, 1015 (D.Mass. 1983) (four at large, nine district); *Cohen v. Maloney*, 410 F.Supp. 1147, 1149-50 (D.Del. 1976) (four at large, eight district); *Markoe v. Legislature of the Virgin Islands*, 592 F.2d 188, 190-91 (3d Cir. 1979) (one at large, fourteen district); *Perry v. City of Opelousas*, 515 F.2d 639, 641 (5th Cir. 1975) (one at large, five district); *Martin v. Venables*, 401 F.Supp. 611, 613 (D.Conn. 1975) (one at large, ten district); *Oliver v. Board of Education*, 306 F.Supp. 1286 (S.D.N.Y. 1969) (two at large, five district). A 137-38, 150-51. *See also Grisbaum v. McKeithen*, 336 F.Supp. 267 (E.D.La. 1971) (three at large, four district).

Both of the lower courts analyzed the functions of the district and at large Board members and both concluded that in New York City, at least, their dissimilarities overwhelm their similarities. To add them together to determine some theoretical quantum of voting power would be to add apples and oranges. This functional analysis by the lower courts was fact-sensitive and clearly correct as a matter of this Court's own approach to problems of representation.

The proposition that officials serve the constituency that participates in their election, and not some sub-set of this group, has been a mainstay of this Court's voting cases. In *Fortson v. Dorsey*, 379 U.S. 433, 438 (1965), for example, district residency requirements in an at large scheme prompted the observation that,

> since tenure depends upon the county-wide electorate, [a senator] must be vigilant to serve the interests of all people in the county and not merely those of people in his home district; thus in fact he is the county's and not merely the district's senator.

And in *Dusch v. Davis*, 387 U.S. 112, 116 (1967), a similar combination of residence requirements and citywide elections was upheld with a qualification: "If a borough's resident on the council represented in fact only the borough . . . different conclusions might follow." *Accord Dallas County v. Reese*, 421 U.S. 477, 480 (1975) ("elected officials represent all of those who elect them, and not merely those who are their neighbors").

Following this principle, the Circuit Court held that

> the Board's members primarily represent the different constituencies that elect them. The borough presidents sit on the Board of Estimate as representatives of the special concerns their constituents have *qua* residents of a particular borough. The citywide members, on the other hand, must be supposed to transcend such purely local interests, and to represent primarily the interests of their constituents *qua* residents of New York City.

A 32-33 (footnote omitted). This analysis is not anywhere disputed by the City. Indeed, this conclusion echoes the City's own submission at an earlier stage:

> It is the borough presidents, not the City-wide officials, who reflect the local interests of each borough. The interests of the City as a whole are not necessarily the sum of the separate interests of each borough.

City Appellees' Brief in the Second Circuit (Feb. 20, 1987) at 27. If citywide interests are not simply those of the sum of the parts, they most emphatically are not those of less than that sum. In short, Brooklyn's overwhelming disadvantage on the Board is not mitigated by the presence of citywide officials on the Board.[47]

The flaw in the City's argument is further evidenced by the fact that the citywide officials on the Board regularly disagree. *See supra* nn.2, 30-37. Surely, they cannot all be representing the interests of Brooklyn, or the other large boroughs, when they disagree among themselves.

When the citywide members divide publicly, or when they disagree privately, none can prevail without the support of one or more borough presidents. The borough presidents are, therefore, the focus of deals engineered by each citywide official in which citywide interests are likely to be tempered by the interests of particular borough presidents. In that horse-trading and logrolling, each borough president has an equal vote and thus equal power. Given equal votes, there is no reason to believe the larger boroughs have any advantage.

In the end, either citywide representational interests are different from or they dissolve into parochial interests of local districts. In neither case has the basic malapportionment of the City's electoral districts been mitigated.

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47 A forceful illustration of the flaw in the City's attempt to distribute at large representation to compensate for malapportioned districts is to imagine an electoral scheme in which delegates were generally elected at large, but one small group, or even an individual, was given an additional representative. This sort of arbitrary and capricious action would appear insignificant when submerged within the larger number of at large representatives. The constitutional measure must identify, not obscure, such arbitrary action.

Intuitively, it might seem that citywide officials would focus their representation on the larger boroughs and that this would have some mitigating effect on district malapportionment. The City, however, offered no such evidence. No evidence was offered because the proposition is simply wrong. Citywide elections are not won by carrying boroughs. They are won by building coalitions of people across all intracity boundaries. There is no correlation of the interests of the larger boroughs, *qua* boroughs, with the interests of these winning citywide coalitions.

No court, including this one, has ever melded at large and district representatives when considering a constitutional challenge to an apportionment scheme in a mixed electoral system. *See e.g. Avery*, 390 U.S. at 475 (four district, one at large representative). The City responds that the issue here is different because, unlike prior cases, the three at large officials control a majority of the votes on the Board. The Circuit Court was singularly unimpressed with this quantitative response to a qualitative analysis of the functions of the different kinds of board members:

> [T]here is no principled reason (nor do appellants attempt to provide one) why *different basic theories* of equal protection should apply depending on the size of the at-large membership.

A 43-45 (emphasis in original). Moreover, the City ignores the more complex voting structure of the Board. On budget issues and issues requiring supermajorities, the citywide officials do not control Board decisions. As a practical reality, the same can be said of majority votes when the rivalries among citywide members cause some of them to divide. *Supra* at 13-15.

The mixed system of at large and district representatives is quite a common form of municipal government.[48] The lower

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48 It is used, for example, in 19% of all cities and in 67% of those cities with a population exceeding 1,000,000, including Philadelphia (ten district, seven at large), Memphis (six district, seven at large), Dallas (eight district, three at large), and Washington (eight district, five at large). *See* H. Sanders, "The Government of American Cities: Continuity and Change in Struc-

court was clearly correct in holding that the same constitutional rule must apply to any such mixed system, regardless of the particular distribution of votes.[49]

2. Appellants' Calculation Of A 30.8% Deviation Among The Boroughs Is Based On A Flawed And Previously Rejected Mathematical Theory Of Voter Strength

This Court's apportionment decisions stand for the proposition that whenever a state or local government chooses to rely on single-member electoral districts, it must make a good faith effort to equalize populations within those districts. Each representative must represent an equal number of people; each voter has a right to participate equally in the selection of representatives. Instead of representation and voter participation, which are grossly unequal here, the City would have this Court focus on the voter's power to affect the outcome of a Board vote. Such a focus is unprecedented. Even accepting this focus, however, the City fails to address the reality of voter power and the Board's actual decisionmaking process, subjects of immense empirical complexity. Instead, it offers a highly controversial, abstract mathematical approach, which does not even purport to represent reality. This theory, moreover, has been previously rejected by this Court, is seriously flawed in itself, and is inconsistent with New York State's own practice of measuring voter power.[50]

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ture," *The Municipal Yearbook 1982*, Washington, D.C.: International City Management Association, 1982, Table 3/3:180; MacManus, "Mixed Electoral Systems: The Newest Reform Structure," 74 Nat'l Civic Rev. 484, 486 (1985). In no other city of which counsel is aware, however, are the districts in such a mixed system based on political subdivisions rather than population.

49 The notion that the presence of the citywide officials somehow mitigates malapportionment among the borough presidents could, by analogy, lead to rather absurd results in state apportionment cases. No one, for example, has ever suggested that malapportionment of a state house is somehow mitigated by the fact that the governor too must approve legislation and that he or she will be more responsive to the voters of the larger districts.

50 The City's theory relies entirely on the controversial mathematical work of Professor Banzhaf. *See e.g.* B. Grofman and H. Scarrow,

The City's mathematical model requires, first, a calculation of each Board member's voting strength based solely on the number of theoretical instances in which a Board member's vote can determine a Board decision—regardless of the likelihood of any of these instances actually occurring. Second, it requires a calculation of each citizen's ability to affect the outcome of the election of a representative, again defined only in terms of the theoretical ability of an individual voter to cast a deciding vote. Third, it requires aggregating each individual voter's theoretical voting power over his borough representative and citywide representatives. We have already explained why this last step is a mistake. The first two steps are no less in error.

a. The Power Of A Representative Is Not Limited To The Ability To Cast A Deciding Vote

The City's mathematical model assumes that the constitutional concept of representation is a function solely of the representative's ability to cast a deciding vote. This is determined by an abstract calculation of the possibility of casting such a vote in all of the theoretically possible combinations of representatives' votes. At no point does this theory of representation make contact with the actual reality of the Board's decisionmaking process.[51]

"Weighted Voting In New York," 6 Legis.Stud.Q. 287 (1981) (hereafter "Grofman and Scarrow: Weighted") (lodged with the Clerk's Office). The Banzhaf theory was never intended to justify malapportioned single-member districts, but rather to design weighted voting systems for districts of disparate populations. Under such a system, there is no reason not to approach substantial equality among the districts: It is just a question of adjusting weighted votes.

51 Notably, Banzhaf himself has explained:

> [M]athematical models do not purport to present a realistic picture of the actual operation of such systems "which of course would involve factors such as party politics and urban-rural interests which are not considered by these simple models."

Iannucci v. Board of Supervisors, 20 N.Y.2d at 258 (Brietel, J., dissenting, quoting Banzhaf).

This Court has never relied upon such a method of calculation.[52] Furthermore, this model is at odds with the concept of representation implicit in this Court's cases analyzing the right to vote. Those cases have focused on equal participation in the process, not on proportional control of outcomes. For example, in *Avery* the Court confronted a commissioners' court composed of four districts and one at large representative. Yet, as the Circuit Court observed,

> [The Court] did not analyze the effect on voting power of the presence of the at-large member, focusing instead entirely on the population disparity among the districts electing the other four members. A court that looks only to voters' relative power to elect representatives for single-member districts, where the scheme also includes at-large members, is obviously not thinking of equality in terms of power over the *outcome* of votes in the governing body.

A 19-20 (emphasis in original). Similarly, in upholding supermajority requirements the Court implicitly held outcome analysis irrelevant in right to vote cases. *Gordon v. Lance*, 403 U.S. 1 (1971).

The Circuit Court appropriately debunked the essential presumption of the Banzhaf scheme:

> The problem is that it gives the same weight to and assumes the same probability of occurrence for each of 552 possible voting combinations . . . . This assumption ignores . . . that deference that the Board traditionally pays the views of borough presidents on matters affecting their boroughs in particular ways.

52 In *Franklin v. Krause*, 32 N.Y.2d 234 (1973), *appeal dismissed for want of a substantial fed. ques.*, 415 U.S. 904 (1974), this Court summarily affirmed a New York State case approving use of a weighted voting scheme that similarly analyzed the representational function. There, however, the approach was used to design electoral schemes to meet *Reynolds*' requirement of population based reapportionment, not to defend an existing malapportioned scheme that was never intended to represent voters. Even the scheme in *Franklin*, however, did not use the second part of the City's methodology: application of the square-root of population size to analyze relative voting power. *See infra* at 33-36.

A 46 (citation omitted). Political realities, not disputed in this case, predetermine Board voting patterns. Furthermore, the presumption behind the City's model contradicts what is common knowledge: A representative is most effective when he is building powerful majorities, not when he is casting his rare, critical vote.

Finally, the City's analysis of representation on the Board ignores the very real and tangible differences in representation inherent in one representative for 350,000 people and one for 2,200,000. In a multi-community borough such as Brooklyn, the borough president's ability to provide constituent services pales by comparison to that of the borough president of Staten Island. *See supra* at 10-15. This role of a representative is fairly equalized by the Court's traditional arithmetic test; it is ignored in the City's model. *See WMCA v. Lomenzo*, 238 F.Supp. 916, 923-24 (S.D.N.Y. 1965).

b. The City's Calculation Of Voter Power Relies On A Theory Already Rejected By This Court As Unrealistic

Turning from representatives to voters, the City's mathematical model again ignores the reality of voter participation. It relies instead upon a quantification of an individual voter's theoretical opportunity to affect the outcome of an election. In calculating this theoretical possibility, the City adopts the controversial square-root analysis advocated by Professor Banzhaf.[53] Instead of directly comparing district populations, the City compares districts by the square-root of the population. This dramatically reduces the numerical expression of the malapportionment.[54]

This Court has once before rejected the Banzhaf theory of square-roots. In analyzing a challenge to the use of multimem-

53 B. Grofman and H. Scarrow, "The Riddle of Apportionment: Equality of What?," 70 Nat'l Civic Rev. 242, 245 (1981) (hereafter "Grofman and Scarrow: Riddle") (lodged with the Clerk's Office). Appellant Ponterio specifically disavows this aspect of the City's methodology because of its reliance on "unrealistic assumptions." Ponterio Brief at 28-29.

54 For example, if one were to accept the City's method of calculation in general but reject the use of the square-root, the malapportionment of the Board would jump immediately from 30.8% to 149%.

ber districts in *Whitcomb v. Chavis*, 403 U.S. 124 (1971), the Court described this same approach as "theoretical," and not " 'tak[ing] into account any political or other factors which might affect the actual voting power.' " 403 U.S. at 145-46 (citation omitted). The Court very clearly stated what a party would have to do before a court could accept this theory in place of the traditional judicial approach to malapportionment issues: A showing, on the record, would have to be made demonstrating a relationship between the Banzhaf methodology and "the real-life impact" of the electoral scheme. *Id.* at 146. The City has never offered to make such a showing. Instead, it offers the same theory rejected precisely because it was only a theory in *Whitcomb*. As the Circuit Court pointed out:

> [A] core claim of the Banzhaf analysis, that the ability of a voter to cast a decisive vote in an election is the proper test of voting power, is unrealistic . . . . It is unrealistic in a general sense involving voter motivation; and it is unrealistic in a particular sense as it applies to citizen voting power through the Board of Estimate.[55]

A 24.

Not only is the square-root theory inconsistent with the Court's traditional view of equal participation in the electoral process, but it creates additional difficulties. Because the square-root approach would assign fewer representatives to multimember districts than would the traditional approach, residents of such districts would not receive the same quality of constituent services as residents of single-member districts. In addition, the key principle that a majority of the population should control a majority of representatives could be undermined: When multimember districts are used in combination with single-member districts, representatives of a minority of

55 The Circuit Court quotes numerous political scientists who conclude that voting has little to do with outcome and much more to do with civic pride, partisanship, race and other group characteristics. Few, if any, voters vote because they think their vote will *win* an election. A 24-25. Perhaps a good analogy is yelling at a football game. It is unlikely the quarterback will hear a particular shout of support and, elated, throw the winning touchdown. But the home crowd roar is always worth several points for the betting spread.

the population could control a majority of the vote on a governing unit.[56] Both of these points are critical to a full understanding of the function and meaning of democratic representation. The City discards both without a word of explanation.

Even under the methodology accepted by the New York courts for evaluating county government voting schemes, the City's argument can find no support. While New York State counties do rely on a "voting power" index for adjusting the weighted vote of town representatives within county government, they have not embraced Banzhaf's square-root principle. *See League of Women Voters v. Nassau County Bd. of Supervisors*, 737 F.2d 155 (2d Cir. 1984), *cert. denied*, 469 U.S. 1108 (1985); *Iannucci v. Bd. of Supervisors*, 20 N.Y.2d 244 (1967); Grofman and Scarrow: Riddle at 244-54. Rather, the State courts require counties to weight votes on the basis of actual population. Adopting the well-established New York method of calculating voting power yields a deviation within the Board's electoral scheme of 338.22%. *See* Charo, *supra* n.7 at 790. This is a figure not even the City would defend.

The combined effects of the City's various theoretical innovations can lead to rather absurd results. For example, were Staten Island *entirely* denied a representative on the Board, the total deviation among districts would improve.[57] By contrast, eliminating Staten Island's representation would, under the Court's traditional methodology, produce an incalculable deviation.

56 *See* Grofman and Scarrow: Riddle, at 252-253.

57 Using the City's methodology, *see* City's Brief at 35-37, each borough president for the boroughs other than Staten Island would have 9.52% of the critical votes, and each citywide official, 20.63%. Deviations would be calculated as follows:

	Citywide Voting Power	*Borough Voting Power*	*Total Voting Power*	*Deviation*
Brooklyn	.02328	.00637	.02965	-5.24%
Queens	.02328	.00692	.03060	-2.20%
Manhattan	.02328	.00797	.03125	-.13%
"Ideal"	.02328	.00801	.03129	0.00%
Bronx	.02328	.00881	.03209	+2.56%
Staten Island	.02328	.00000	.02328	-25.59%

Total Deviation 28.15%

This example is meant only to illustrate a basic point: The City's complete reliance on a controversial, abstract theory invites the Court to enter into precisely the kind of "imbroglio of mathematical manipulation," *Mahan*, 410 U.S. at 319 n.6, that this Court has avoided for twenty-five years. The mathematical manipulation of the data in this case has been of immense complexity. Calculations of the quantitative deviations of voter strength within the boroughs have varied from 338% to 30.8%. In the end, all of the competing models "are just a shorthand for expressing population differences," Charo at 793. The real concern must focus, not on the various competing theories, but on the underlying gross population differences among the boroughs. Theory cannot hide the fact that Brooklyn has six times the population of Staten Island, yet each has equal representation on the Board.[58]

Finally, the City's mathematical methodology assumes that a court can compare percentages of deviation of voting power, arrived at under this *sui generis* method, with deviations fixed by the Court's traditional method. Assuming that the City's mathematical methodology measures something, the 30.8% deviation measures some idiosyncratic, hybrid amount of voting power deviation. This number simply cannot be compared to results obtained under the standard measure which compares varying populations per district. Some translation of the figures into a common language is required.[59]

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58 The difference in treatment of Brooklyn and Staten Island is clear to every voter. Only a theoretician with a sophisticated computer program could begin to believe that that difference is not what it seems. At that point of complexity, however, theory becomes too complex even for the lawyers and the courts. *See e.g.* Ponterio's calculation of a 12% deviation, *supra* n.45. Such problems would be endemic to a reliance on complex mathematical theories. Thus, it is not coincidental that the same mistake that Ponterio makes appears in the papers upon which the Court relied in its summary affirmance in *Franklin v. Krause*. For a detailed explanation, *see* Grofman and Scarrow: Weighted at 297-299.

59 For example, in *Cohen v. Maloney*, 410 F.Supp. 1147 (D.Del. 1976), the district court found 18.4% deviation as a basis for invalidating a mixed district and at large system. *See supra* n.46. Under the City's methodology, that invalidated deviation is only 3.8%.

II.

The City's Proffered Justifications Fail To Correspond To The Facts In New York City Or To The Interests Previously Recognized As Legitimate By This Court

Apart from gerryrigging the numbers, the City offers two arguments to justify the substantial deviations from equality at issue here. First, it argues that substantially increased "flexibility" is required in the evaluation of innovative municipal designs. Second, it argues that a range of special Board functions justify its structure, despite the substantial deviations from equality. In fact, New York City does not exhibit the characteristics that have generally led this Court to speak of a need for flexibility in the evaluation of municipal institutions and the special functions identified either are not served by the Board scheme or are based on misreadings of this Court's prior cases.

A. New York City Does Not Exhibit Those Characteristics That Could Justify Increased Flexibility

The City substantially misunderstands what this Court has meant by "flexibility" with respect to the constitutionality of municipal governmental institutions. While the Court has indicated that some "slight" increase of deviations from voter equality might be permissible in the municipal context, it has usually had quite a different idea in mind when it has spoken of flexibility. It has meant flexibility *within the rule of one person, one vote*. This point was made in *Avery*, in which the Court emphasized that it was not erecting "roadblocks in the path of innovation, experiment, and development among units of local government." 390 U.S. at 485, *citing Sailors v. Bd. of Education*, 387 U.S. 105 (1967), and *Dusch v. Davis*, 387 U.S. 112 (1967). The citations to *Sailors* and *Dusch*—the very cases upon which the City relies—make this entirely clear. Both involved innovative local government designs that did not offend the principle of *Reynolds*: not because greater quantitative deviations were permitted, but because the rule was either not applicable at all or was wholly satisfied. *Sailors* involved the use of appointed office to which *Reynolds* does not apply. *Dusch*

involved the use of at large elections combined with district residence requirements; the at large quality immediately satisfied the rule of one person, one vote. These were intended as examples of the ample room for flexibility that remains under the constitutional rule of voter equality.[60]

Thus, there was no contradiction in *Avery* between the Court's affirmation of municipal innovation and its imposition of

> one ground rule for the development of local . . . government: a requirement that units with general governmental powers over an entire geographic area not be apportioned among single-member districts of substantially unequal population.

390 U.S. at 485-86. This remains true in New York City. As the lower courts found, there are a variety of alternative structures available to the City that will meet its interests as well as the constitutional requirement of equality. *See infra* at III.

Flexibility need not, accordingly, mean inequality. If flexibility is interpreted to mean slightly relaxed standards of equality in comparing municipal electoral districts, *supra* at 22-24, then an examination of the reasons for that kind of flexibility demonstrates their inapplicability in the circumstances of this case.

The less severe standard of equality for state, as opposed to congressional, apportionment schemes has been based on three factors: first, congressional districts are "enormous" compared to typical state legislative districts, *White v. Weiser*, 412 U.S. 783, 793 (1973); second, there are normally "a significantly larger number of seats in state legislative bodies . . . than congressional seats [within a state]," *Mahan*, 410 U.S. at 321; third, state legislative districts are normally "intertwined and freighted with strictly local interests." *White*, 412 U.S. at 783; *see also Karcher v. Daggett*, 462 U.S. 725, 781 (1983) (White J., dissenting). The rationale for a slightly weaker standard of

60 Special governmental units with a limited franchise represent yet another kind of local government innovation that does not conflict with the rule of *Reynolds*. *See Sayler Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973); *Ball v. James*, 451 U.S. 355 (1981).

equality in the case of municipal governments has been explained by citing parallel considerations:

> (1) [L]ocal legislative bodies frequently have fewer representatives than do their state and national counterparts. *Abate*, 403 U.S. at 185.
>
> (2) [L]ocal legislative districts may have a much smaller population than do congressional and state legislative districts. *Id.*
>
> (3) [T]he need for intergovernmental coordination is often greatest at the local level. *Id.* at 186.

This list, however, was tempered with a reminder: "Of course, this Court has never suggested that certain geographic areas or political interests are entitled to disproportionate representation." *Id.* at 185.

Both lists focus on a functional account of the reasons for, and the effects of, loosening the standard of equality.[61] The functional reasons emphasize a sensitivity to efficient operation of governmental services within a situation in which representation of "local interests" is critical if government is to respond to "changing societal needs." *Abate*, 403 U.S. at 185. The expected effect of slightly greater deviations at the local level is less significant because the districts are generally small. None of this is true in New York City: Neither the functions nor the effects that the Court has focused on in its discussion of local government is present in this City of more than 7,000,000 people.

First, the enormous size of the Board electoral districts means that even slight deviations will deny an equal vote to tens of thousands of people. Four of the five districts are larger than congressional districts. Brooklyn and Queens subsume 9 congressional districts, 13 (and parts of two more) state senatorial

61 These lists are in some tension. The larger number of state legislators, as compared to congressional members within a state, is listed as a reason for loosening the standard for evaluating state legislative schemes. By contrast, the smaller number of municipal representatives, as compared to state legislators, is listed as a reason for loosening the standard of equality in evaluating municipal legislative schemes.

districts and 35 state assembly districts. Brooklyn is by far the most populous substate representational district in the nation, and Queens is second. Thus, the effects of population deviations here are not comparable to those in a typical municipal government and are clearly not what the Court had in mind in its discussion of local electoral schemes.

Second, the functions of Board representation fail to correspond to the concerns expressed in *Abate*. The Board structure is surely not an attempt to "meet changing societal needs."[62] Nor do Board districts correspond in any meaningful way—outside of Staten Island—to "local interests." Brooklyn, which in itself is larger than 17 states, is hardly an example of the "localism" the Court was seeking to protect. At issue in this lawsuit is precisely the failure of the Board structure to give expression to the diverse local interests and local communities within the larger boroughs.

Finally, granting the Board equal votes for large and small boroughs alike, incorporates the kind of "built-in-bias" warned against in *Abate*, 403 U.S. at 185-186 ("[A] built in bias . . . which necessarily will tend to favor . . . less populous districts over their more highly populated neighbors") and held unconstitutional in *Hadley v. Junior College District*, 397 U.S. 50, 56-58 (1970) (allocation of school board seats inevitably favored small districts).

This Court has frequently warned that apportionment challenges require a case-by-case approach that looks to the unique facts of each electoral scheme. *Reynolds*, 377 U.S. at 578; *Mahan*, 410 U.S. at 328-329; *Swann v. Adams*, 385 U.S. 440, 445 (1967). On the facts of this case, application of a flexible standard of equality is unjustified.

62 To the extent that there have been any changes at all in Board structure, they have increased, rather than decreased, the malapportionment. Up until 1958, there was at least some crude recognition given to population differences among the boroughs: The two largest boroughs had votes weighted at twice that of the other three boroughs. If that system were still in use, the deviations would be 76%.

B. The City's Justifications Fail

1. The Board Is Not A Regional Government

The City's primary justification rests on what it perceives to be a "regional government" exception to the ordinary rule of one person, one vote.[63] While this Court has never explicitly defined or articulated a "regional government" doctrine under *Reynolds*, it has been sensitive to a cluster of concerns that can be characterized as "regional." The City, however, misconstrues both the nature of these concerns and the nature of New York City government.

The Court has recognized that certain forms of governmental entities do not generally operate directly on their constituent populations. Rather, some significant portion of their work is directed at constituent governmental entities. In effect, they operate through and with constituent governmental entities, which, in turn, maintain a direct relationship with the people. *See Lockport*, 430 U.S. at 268-272. In these situations, the "regional government" has responsibilities for coordinating the actions of the local governmental entities and acting in cooperation with these subordinate units of government.

This was just the sort of governmental structure that the Court examined in *Abate*: a "local structure in which overlapping public services are provided by the towns and their county working in close cooperation." 403 U.S. at 183. Examples of this cooperation included budget and tax matters—"the towns adopt their own budgets and submit them to the county which levies taxes . . . based on real property assessments established by the towns but equalized by the county board," *id.*—and "cooperative efforts" in the provision of public services. *Id.* These parallel efforts justified the use of an apportionment plan that, while based substantially and primarily on population equality, also sought to preserve "an exact correspondence

63 The City's justifications are for the most part a rehash of justifications offered and rejected by this Court in its summary affirmance of the unconstitutionality of the New York City Council's allocation of two at large seats to each borough. *Andrews v. Koch*, 528 F.Supp. 246 (E.D.N.Y. 1981), *summ. aff'd*, 688 F.2d 815 (2d Cir. 1982), *aff'd sub nom.*, *Giacobbe v. Andrews*, 459 U.S. 801 (1982).

between each town and one of the county legislative districts." *Id.* at 187.

Other cases discussing regional interests are marked by similar functional interactions between active and effective local government, on the one hand, and the regional entity, on the other. In *Brown*, for example, the Court's sensitivity to county representation within the State House was founded on the fact that "counties are the primary administrative agencies of the [Wyoming] State government." 462 U.S. at 841 n.5. And in *Mahan*, the Court relied heavily on the government (regional) to government (local) operations of the state legislature. 410 U.S. at 323.

The doctrine, then, has little to do with some sort of "regional level" of government. Rather, it has to do with certain structural features of some institutions of state government, regardless of whether they appear at the state, county or municipal level.[64] In this case, those structural features are not present. The boroughs have atrophied to the point where they do not deliver services, collect taxes, or regulate the affairs of borough residents. There simply is no local government upon which a "regional government" could operate in New York City.

Notwithstanding the City's lengthy compilations of borough references in the City Charter and State statutes, City's Brief at 6-7, the absence of borough authority to pass ordinances, set tax rates or abatements, fix a budget, determine land use, execute contracts, administer agencies, issue debt or perform any other typical governmental function disqualifies these particular political subdivisions from any fair characterization as active governmental units. *See supra* at 8-10. It is beyond dispute that a borough's only elected official—the borough

64 Interestingly, in each of the cases in which the Court has suggested approval of this doctrine, the State had recently undergone a reapportionment in order to bring the existing apparatus of State government into line with the requirements of the constitutional rule of one person, one vote. In each case, the state had relied on this doctrine in order to make some minor modifications in that reapportionment plan. In the context of an on-going, good-faith effort to meet the requirements of *Reynolds*, the Court recognized this competing end.

president—has virtually no authority independent of his or her role as a Board member. Thus, while the Court has shown a sensitivity to regional concerns, "regionalism" is hardly a label that can be applied to a municipality that comprises no other governments within its jurisdiction. New York City government is no more regional in the relevant sense than is any other centralized government that bases membership on elections within geographically defined districts.

2. The Board Structure Does Not Serve Local Community Interests

Regionalism is also confused by the City with the separate justification of "localism." The Board, the City argues, makes decisions about land use and the provision of services that have a particularly local impact. Therefore, unlike a state legislature,

> the use of pre-existing boundaries is not simply a matter of convenience; a direct relationship exists between the Board's powers and operation and the historic, geographic and political boundaries of the borough.

City's Brief at 29. Again, the City has confused two distinct ideas, only one of which is valid.

Appellees do not contest the fact that the Board exercises the critical powers of centralized government in the City and that many of the Board's decisions have a particularly local impact. Such decisions may indeed be best made by an institution of government that includes, either wholly or partially, representatives of local districts. This is a central reason for the widespread preference for the use of small geographical districts. Appellees have never suggested that the Board must be, or even should be, replaced by a new institution of centralized government consisting wholly of at large members.

Localism in this functional sense, however, is not furthered, but rather undermined, by the structure of the Board. This is vividly demonstrated in the City's own brief when it describes the reason that the borough president of Staten Island sits on the Board:

> [N]ot because it seemed a nice way to form a district [but rather because] the use of land in Staten Island is controlled by a central authority whose decisions about the land peculiarly affect the people there.

City's Brief at 43. What is true of land use in Staten Island, however, is true of every local community throughout the City. What is also true, however, is that the people of the other neighborhoods are not as well represented on the Board as the people of Staten Island. Staten Island is hardly unique in its concern with the Board decisions that affect it. Yet it is unique in the power it has to participate in those decisions. *See supra* at 10-15, 28-30.

3. History And Efficiency Alone Cannot Justify The Board Structure

Finally, the City offers a mix of historical and efficiency arguments to justify the gross inequalities in the treatment of voters in the various boroughs. In themselves, of course, neither history nor efficiency have ever been recognized as grounds for the denial of an equal right to vote.

History has not been a virtue, but a tremendous burden, in reorganizing state and local government to meet the constitutional principle of one person, one vote. The state legislature of Alabama at issue in *Reynolds*, for example, had not been reapportioned since 1901. This sixty-three year history hardly counted in favor of the plan. As the Court recognized, "[r]epresentation schemes once fair and equitable become archaic and outdated." 377 U.S. at 567. If the scheme of the Board of Estimate was ever "fair," it has long since become "outdated."

Moreover, the City does not have its history right. Representation of borough presidents on the Board *was not* a condition of unification of the various local governments brought together to form the City of New York in 1898. City's Brief at 3, 8-9. The State *did not* conclude "that providing an equal vote to borough presidents was essential to obtain a consensus on the transfer of local power to a central authority." *Amicus* Brief of Beame and Sutton at 6. First, no such consensus was ever sought or obtained. Second, boroughs were not even represented on the Board at the time of, or as a result of, consolidation. *See supra* at 3-5. Even if the City had its history right, however, it cannot be the case that a deal cut in the past can hang over the constitutional rights of the present voters of New York City. The constitution does not authorize the State to bargain away the constitutional rights of New York City's residents, even if the deal was made 100 years ago.

Closely connected to these "historical" arguments is the claim that the small size of the Board and its equal treatment of district representatives make it "efficient." But the right to an equal vote is of constitutional stature, *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live."); *Kramer v. Union School District*, 395 U.S. 621, 626 (1969); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972), and as such it cannot be denied for the sake of efficiency alone. *Reed v. Reed*, 404 U.S. 71, 76 (1971); *Stanley v. Illinois*, 405 U.S. 645, 656 (1972); *Trimble v. Gordon*, 430 U.S. 762, 770-72 (1977). The issue is not whether New York City is being run well—an issue on which opinions will vary across the political spectrum—but whether the citizens of New York are being denied a constitutional right to equal participation in the electoral process by which they are governed.

III.

The Lower Courts Appropriately Looked To Evidence Of Alternatives, Not To Frame Possible Remedies, But To Measure The Strength Of The City's Interests In The Board Electoral Scheme

The City does not appropriately characterize the lower courts' action in considering alternatives, when it describes those courts as applying a "least restrictive alternative" analysis. City's Brief at 44. The lower courts, rather, adopted a wholly commonsense approach to measuring the strength of the City's proffered interests in this particular Board structure by looking to reasonably available alternatives that could meet

those interests equally well, without intruding so massively on constitutional rights.

This approach has frequently been approved by this Court. The consideration of reasonable alternatives was critical in the Court's reversal of a lower court's judgment sustaining the constitutionality of a 1965 reapportionment plan for the Texas State House. *Kilgarlin v. Hill*, 386 U.S. 120 (1967). The district court in *Kilgarlin* was reversed for failing to do exactly what the lower courts did in this case:

> [T]he District Court [did not] articulate any satisfactory grounds for rejecting at least two other plans presented to the court, which respected county lines but which produced substantially smaller deviations from the principles of *Reynolds v. Sims*.

Id. at 124.

Conversely, in approving a 1971 Virginia plan for the reapportionment of the House of Delegates, this Court specifically relied on the fact that

> [t]here was uncontradicted evidence offered in the District Court to the effect that the legislature's plan . . . "produces the minimum deviation above and below the norm, keeping intact political boundaries."

Mahan, 410 U.S. at 326 (citations omitted). Obviously, if the Court is going to rely on "uncontradicted evidence," it is inviting the parties, and instructing the lower courts, to consider contrary evidence that alternative plans may produce a lower deviation while "keeping intact" state ends. *See also Swann v. Adams*, 385 U.S. 440, 445-46 (1967).

Consideration of possible alternatives is not only common in the case law, it is necessary to a coherent doctrine. The City's position would require upholding deviations from voter equality whenever those deviations might, under some hypothesized set of facts, further some legitimate state interest. Without some examination of the means the state has chosen to meet even an admittedly legitimate end, the right to vote cannot be protected as an important, let alone a fundamental, right. Those means cannot be examined in the absence of a careful

consideration of alternative ways of meeting the state's interests.[65]

The consideration of alternatives is particularly appropriate in a complex fact situation like that in New York. For example, while this Court would not normally—indeed has never—suggested that among the alternative apportionment schemes that a lower court should consider are systems of weighted voting, New York State courts have accepted just such a scheme for county government. Not only is weighted voting an option, but historically it has been a feature of the Board structure: Citywide members exercise a weighted vote today and until 1958 the votes of the borough presidents were themselves crudely weighted to reflect population differences among the boroughs.

This factual texture is precisely what this Court had in mind when it warned that "[w]hat is marginally permissible in one State may be unsatisfactory in another, depending upon the particular circumstances." *Reynolds*, 377 U.S. at 578; *Swann*, 385 U.S. at 445; *accord Mahan*, 410 U.S. at 328. Only a district court, thoroughly familiar with the structure of local government and the reality of local political life, can engage in the kind of sensitive consideration of realistic alternatives that is required to measure the dimensions of the threat to the right to vote contained in state and local apportionment plans that deviate substantially from population equality. This is precisely what the District Court did in this case when it concluded that "defendants have failed to carry their requisite justification burden." A 110.

The District Court demonstrated its clear understanding of the role that consideration of alternatives has in an apportionment case when it went on to state that

> [c]onsistent with its circumscribed role, the court underscores that, while the preceding justification discussion noted the availability of possible alternatives, by no means are they recommended for implementation.

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65 For example plaintiffs presented an alternative weighted voting scheme that satisfies the City's legitimate interests with only a 7.8% deviation from voter equality. JA 565-69.

Id. at 111. Restructuring the Board to meet the rule of one person, one vote, remains a "legislative task." A 110.

CONCLUSION

Accordingly, the judgment of the Court of Appeals for the Second Circuit should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

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Appellants,

v.

BEVERLY MORRIS, *et al.*,
Appellees.

FRANK V. PONTERIO,
Appellant,

v.

BEVERLY MORRIS, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR MUNICIPAL APPELLANTS AND APPELLANT STRANIERE

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THE COMPOSITION AND VOTING SYSTEM OF THE BOARD OF ESTIMATE COMPORT WITH THE CONSTITUTION.

A. Appellees' Mechanistic Analysis Misconceives The Principles Embodied In This Court's One Person, One Vote Jurisprudence. The Voting Structure of the Board of Estimate Should Be Upheld Because It Accords Substantial Equality Of Voting Power To The City's Voters And Respects The Principle Of Majority Rule.

Appellees' analysis of their equal protection claim goes like this: First you find a convenient mold into which you squeeze the Board of Estimate. Anything that doesn't fit (like the three city-wide officials) you ignore. Then you judge deviations from "perfection" by measures appropriate to the mold (but not appropriate to the institution being judged). The magic number is 17% (Appellees' Br. at 22). Anything less may be justified; anything more must be rejected. As for the need for flexibility, only small local governments get its benefits. Large local units, like New York City, do not.

This mechanistic analysis misconceives the important principles embodied in the Court's one person, one vote jurisprudence. That jurisprudence is not a series of arithmetical puzzles or tests. It embodies principles of political equality which attempt to insure that citizens enjoy substantially equal opportunity to exercise electoral power. On the local level, the Court has recognized the need for flexibility—not, as appellees appear to suggest (Appellees' Br. at 38-40), because local governing units are small, but because they are so numerous, so diverse in powers and structure, so close to the people they govern, and so individually tailored to the needs of the locality. Forcing all these local units into a few approved molds would seriously limit local options and destroy the diversity which itself is so important to democratic governance in a country as large and complex as ours.

The Board of Estimate illustrates why the one person, one vote principle should be applied flexibly in judging local governments. The Board is an institution that has evolved in response to

the particular needs of New York City. For its eighty-eight year history, it has expressed the shifting compromises between regional and local needs that has made possible the governance of the City. And, most importantly, it has done so respecting the principle of majority rule and substantial equality of voting power.

The three city-wide officials on the Board cast six of the eleven votes. Thus, as we noted in our main brief, with respect to almost all of the Board's business, no combination of borough presidents can overcome the collective will of the city-wide officials. When the city-wide officials split their votes (2 to 1), the lone city-wide official cannot prevail without the concurrence of at least four borough presidents representing at least 70% of the City's population. The presidents of the three less populous boroughs (Manhattan, the Bronx and Staten Island) cannot prevail as against the presidents of the two larger boroughs (Brooklyn and Queens) without the concurrence of at least two of the three officials elected by all City voters.

Appellees have not responded to this analysis of the Board's voting structure but attempt instead to deflect attention from it by focusing almost entirely on but one of the Board's functions—with respect to the budget—when its voting structure is different. When the Board acts on the budget, the Mayor does not cast a vote as a member of the Board. N.Y.C. Charter §§120(d); 222(c) (hereinafter "Ch.") (Thus there are five borough president votes and four city-wide votes.) But even here, a majority can be obtained only with the concurrence of one or more officials elected by all the voters of the city, or by action of all the borough presidents voting *unanimously*. Further, the Board's role in the budgetary process is itself quite limited. The process is dominated by officials who are elected by all the people of the city—the Mayor (who plays the leading role in the process), and the two other city-wide officials on the Board of Estimate (the Comptroller and the President of the City Council)—and by the City Council, which not only must concur with the Board on the budget, but must also raise the revenues to finance the budget. Ch. §§116; 120(b); 124; 219(a); 222(a); 1516.

Under the City Charter, the Mayor proposes the budget. Ch. §§116; 219. Once that proposed budget is submitted, it is ex-

tremely difficult to make changes without, or indeed even with, the Mayor's consent. Even if the Mayor agrees with a change, it still takes a majority of the City Council and five of nine votes on the Board to make the change effective. Ch. §§120(a); 222. Thus, to effect a change even with the Mayor's agreement, it takes the concurrence of either (1) all five borough presidents and a majority of the City Council, or (2) three of the five borough presidents and an official elected by the voters of all the boroughs and a majority of the City Council or (3) one borough president and two officials elected by the voters of all the boroughs and majority of the City Council. Without the Mayor's concurrence, a change is not effective in his proposed budget unless a super-majority (2/3) of either the Board or the Council and a majority of the other body votes in favor of the change. Ch. §§121(b); 223(a)

It is not surprising, then, that the budgets ultimately adopted have been substantially the same as those proposed by the Mayor. For example, in the budget for the fiscal year 1989, changes from the proposed expense budget to the adopted budget amounted to approximately .2% of the budget. In fiscal 1988, the changes amounted to .42%. In fiscal 1987, the changes amounted to .15%.[1]

There are other major ways in which power to shape the budget is wielded, which do not involve the Board of Estimate at all: the power to estimate revenues and the power to raise revenues by taxation. Under the City Charter and state law, the City must have a balanced budget. Financial Emergency Act for the City of New York §§8(1)(a), N.Y. Unconsol. Laws §5410(1)(a) (McKinney 1979); Ch. §1516. Thus, the power to increase, or refuse to increase, taxes is the power to influence the shape of the budget. In New York City, it is the local legislative body — the City Council — which has sole authority to levy taxes, whether taxes are raised pursuant to state enabling legislation (*e.g.*, income tax, sales tax [N.Y. Gen. City Law §25-m *et seq.* (McKinney

[1] *Compare* The Executive Budget of the City of New York for the Fiscal Year 1989 at 4E [hereinafter "Executive Budget"] *with* Adopted Budget for Fiscal Year 1989; *compare* Executive Budget of the Fiscal Year 1988 at 4E *with* Adopted Budget for Fiscal Year 1988; *compare* Executive Budget for the Fiscal Year 1987 at 4E *with* Adopted Budget for Fiscal Year 1987.

1968); N.Y. Tax Law §1210, *et seq.*; §1300 *et seq.* (McKinney 1987)]), or as provided by the City Charter (real property taxes [Ch. §1516(a)]). Ch. §§21; 27. As part of the budget process, the Mayor estimates all sources of city revenue other than real property taxes. Any difference between this estimate and the amount of the budget must be made up by taxes on real estate. Thus, substantial increases in the budget would require a decision to raise real estate taxes for city residents and businesses. This decision is made solely by the City Council and does not involve the Board of Estimate.[2]

Thus, the voting structure of the Board of Estimate is not so simple as appellees would have it. It is a structure which accommodates the complex needs of the City but at the same time ensures that decisions can not be made without the concurrence of officials who represent a majority of the City's voters.

B. As A Method Of Analysis, The Banzhaf Index Is Superior To The One Urged By The Appellees And Adopted By The Courts Below Which Ignored The Structure Being Analyzed. In Any Event, The Constitutionality Of The Board Should Not Depend On The Correctness Of Any Particular Method Of Analysis But Rather Should Depend Upon The Structure Of The Board Itself And The Important Policies It Was Designed To Further.

Appellees attack the Banzhaf Index as if we were proposing it as a test, the passage of which would determine the constitutionality of the Board. We do not believe the Index is any such thing. We propose it simply as a way of describing a voting structure more complex than that of the typical single member legisla-

[2] The Board of Estimate has the power to approve franchise fees and fees for waste disposal by private carters (together amounting to .6% of the City's total revenues). Appellees' claim that the Board has a "significant impact" on the City's tax rate "through its cumulative powers to control revenue from land use and franchises" (Appellees' Br. at 7) is palpably incorrect. Any attempt to affect the tax rates in a City with a budget in the billions through franchise fees and the like is akin to lowering the City's harbor with a water bucket. Appellees also misstate that the Board of Estimate controls the water and sewer rates. That responsibility is with the New York City Water Board. N.Y. Pub. Auth. Law §§1045-g(4); 1045-j; 1046 (McKinney Supp. 1988).

tive district. Methods of analysis appropriate to these less complex structures (like simply comparing the populations of the districts) are not meaningful when applied to a structure, like the Board, which combines district representation and at-large representation and also weighs the votes of the at-large representatives more heavily than (two times) those of the district representatives. If a method of analysis is not appropriate to a particular voting structure, the answer is to use a different method of analysis — not to find reasons for ignoring the voting structure and judging the body as if it were something other than what it is.[3]

Because the real Board of Estimate does not easily fit the simplistic analysis favored by appellees, they (and the courts below) have been forced to search for reasons to ignore the existence of the six city-wide votes on the Board. They have settled on a theory — that the city-wide officials and the borough presidents represent different "interests" (Appellees' Br. at 27-29) — which is entirely inconsistent with the claim appellees have put forth in this case. That claim is not based on allegedly unequal representation of "interests." The claim is that the voting structure of the Board creates an unconstitutional diminution of the electoral power of individual voters in Brooklyn and Queens. But the fact is that each of those individual voters has the opportunity to wield his or her electoral power by voting for *four* members of the Board — not one. Put another way, each voter has the opportunity to vote for officials who cast seven votes on the Board (three city-wide officials who cast two votes each and one borough president who casts one vote). Appellees' analysis, adopted by the courts

[3] As appellees themselves recognize (Appellees' Br. at 32, n.52), appellate courts, including this one, have approved the use of methods of analysis other than a simple arithmetical comparison of population. For example, in *Franklin* v. *Krause*, 32 N.Y.2d 234, 344 N.Y.S.2d 885, 298 N.E.2d 68 (1973), *appeal dismissed for want of a substantial federal question*, 415 U.S. 904 (1974), the New York Court of Appeals approved an analysis of voting power similar to the one we have urged here. In *Franklin*, that analysis was applied somewhat differently from what we have urged. But, for the reasons we fully explained in our main brief (Appellants' Br. at 35-38), we believe that with respect to a body like the Board of Estimate, our proposed application of that analysis is more appropriate.

below, simply ignores 6/7 of the voter's opportunity. No amount of argumentation can hide the unreality of the analysis advocated by appellees and upon which the decisions below rest.[4]

The Banzhaf Index is an attempt to look at the voting structure of the entire Board not just one part of it. As a method of analysis it is surely superior to one which ignores the body being analyzed. Moreover, the criticisms leveled against the Index by the appellees are beside the point. These criticisms go to the question whether the Index accurately describes the political realities and dynamics of the Board. But neither the Index nor the analysis used by appellees and the courts below is designed to measure these dynamics. The Index is designed simply to analyze the rules that make up the formal voting structure of the Board. That, after all, is what is addressed by the one person, one vote principle. Under the rules which govern voting, does each citizen have a constitutionally appropriate opportunity to affect the governing body through his or her vote? If the answer is yes, as we believe it is here, questions of how power is exercised by members of the body from issue to issue in the hurly-burly of political life is beyond the scope of inquiry.

The Banzhaf Index is nothing more than a lens through which to view the formal voting structure of the Board. For reasons explained in our main brief, we believe it is an appropriate lens. However, ultimately the continued existence of the Board should depend not on the appropriateness of the lens but upon the structure of the Board itself and upon the important state policies reflected in that structure. The salient characteristic of that structure is that decisions of the Board cannot be made with-

[4] Appellees cite in support of their position, Charo, *Designing Mathematical Models to Describe One-Person, One-Vote Compliance by Unique Governmental Structures: The Case of the New York City Board of Estimate*, 53 Fordham L. Rev. 735 (1985). (Appellees' Br. at 24, 35). But Ms. Charo criticized the District Court for failing to consider the votes of the city-wide officials in its calculation of the deviation and urged the application of Professor Banzhaf's voting power principles. *Id*. at 758, 775, 794 n.308. However, as noted by Professor Banzhaf in his amicus brief at page 24 n.31, Ms. Charo's calculations were done erroneously.

out the concurrence of officials who represent a majority of city voters.

C. The Structure Of The Board Of Estimate Respects The Principle Of Majority Rule and Substantial Voter Equality While It Also Embodies The Compromise Between Local Autonomy And Centralized Authority Which Has Been Vital To The Successful Governance Of The City.

Respect for majority rule has been a central part of the compromise reflected in the Board during all of its almost 90 year history. This compromise—accommodating the need for local representation and the needs of the larger consolidated city — has contributed in crucial ways to the growth and successful governance of the City. Appellees attempt to minimize the importance of this history by suggesting that this Court should not give great weight to a "deal" made almost ninety years ago (Appellees' Br. at 45). But the Board is not the relic of a ninety year old "deal." It is a response to conditions which were evident ninety years ago and which continue today.

Consolidation of the City in 1898 brought a great centralization of power and with it a great dissatisfaction about that centralization. Borough representation had not been given sufficient respect; and the borough presidents were not given substantial power. This dissatisfaction threatened to destroy the consolidation. In the next three years dramatic changes were made to redress the balance—and save the City. Most importantly the borough presidents were given votes on the Board of Estimate.

The recently issued report of the Citizens Union Foundation of the City of New York, lodged by appellees with this Court, describes the history as follows:

> Although the 1897 Charter provided for a strong mayor and a strong centralized government, it attempted to protect the local interests of the various towns and counties that became greater New York by creating the office of an elected president in each of the five new boroughs. He functioned as a borough mayor and was connected to the central city government through membership on the Board of Public Improvements. It is important to note that the borough president, with very limited powers, could vote only on those issues coming before the Board of Public Improvements that involved his borough. . . .

There was almost immediate dissatisfaction with the 1897 Charter. Brooklyn felt short-changed under consolidation, both in terms of the hoped-for public improvements and in terms of local autonomy. There were widespread feelings that the boroughs should be allowed to regulate their own distinctly local improvements[.]. . . [T]he 1901 Charter did give the borough presidents extensive authority over public works. The State Charter Revision Commission in 1900 redistributed power in the city and made the Mayor and the borough presidents "partners" in the newly designed Board of Estimate and Apportionment. The Commission, concerned with borough representation as well as with borough control over local improvements, wrote:

> It is clear that the vast territory composed within the present City of New York, embracing as it does, districts so essentially different as the crowded east side of Manhattan and the rural districts of Queens demand some subdivision and some degree of local autonomy....

"Borough Representation", Citizens Union Foundation Report to the New York City Charter Revision Commission at 14-15 (March 1988), *reprinted in* Appellees' Lodged Material [hereinafter, "Citizens Union Report"].

These issues of centralization and borough representation did not disappear in 1901. They are still with us. As the Citizens Union Report says:

> Words similar to these [describing the need for borough representation] appear over and over again in the literature. They could have been said in the 1930's, 1950's or 1970's; the issue simply has not been resolved and perhaps can never be.

Id. at 15.

Every charter revision commission since that of 1900 has faced the same questions. Every one has left the structure of the Board largely unchanged. These decisions were not the result of an unthinking obeisance toward history. After careful study,

those charged with the responsibility of making changes recognized the wisdom of, and the continuing need for, borough representation on the Board. The counsel to the 1900 Charter Revision Commission, who drafted the provision which gave the borough presidents a seat on the Board, wrote that the provision was "necessary at the time as the boroughs were faring badly under the centralized local government. . .The boroughs were sadly in need of local improvements and couldn't get them" (Quoted in Citizens Union Report at 16).

The 1938 Charter made major changes in city government. But, in the words of the Citizens Union Report, the Charter Revision Commission that recommended the adoption of that charter

> retained the borough presidents on the Board of Estimate to allay the fears of the outlying boroughs that they would lose power and autonomy.

Id. at 21.

The Commission summarized the reasons for its decision as follows:

> With respect to borough government, the Commission has adopted neither of the two extreme views which were vigorously pressed upon it, the one that the borough president should be abolished and all administration centralized and the other that the existing administrative powers of the borough presidents should be increased rather than curtailed. The Commission is satisfied that there exists in a large part of the city an overwhelming sentiment . . . for borough representation on the Board of Estimate. . . . It is the conviction of the Commission that such representation is not only important in the interest of the boroughs but in the interest of the city as a whole. Those who administer the manifold affairs of the city should be intimately familiar with the conditions and needs of the five boroughs. . . .

Quoted in Citizens Union Report at 21-22.

In 1961, a summary report of a state commission on governmental operations found New York City's borough organization to be "unique" because it brought "representatives of the boroughs into the top structures of local government." As described

by the Citizens Union Report, the 1961 report found that the borough president continued to be the spokesman for his borough. The 1961 report

> spoke of "this big city with its borough traditions, borough representation and leadership functions and citizen contacts" (p. 9). It "recognizes that the five boroughs in New York City have a time-honored place in the tradition of the community. The role of borough presidents as community leaders within their boroughs is a matter of civic necessity"....

Id. at 23.

More recently, when certain powers of the borough government were being redistributed — some to the City and some to units smaller than the borough — there remained a continuing recognition that borough representation, through the borough president's vote on the Board of Estimate, was very important. The Citizens Union Report describes the 1975 Charter Revision as follows:

> The borough presidents were to serve as the glue to keep these separate communities from flying apart. They were seen by the [Charter Revision] Commission as the "most knowledgeable public officials with respect to the competing influences and forces in the affected community." They were seen as "broker advocates," giving private citizens direct access to decision makers at the highest level through their position on the Board of Estimate. Their positions were maintained and further institutionalized within the new Community Board structure.

Id. at 24-25.

Thus the forces which created the Board's structure in 1901 are the same as those which make the Board so important now. "[F]or millions of New Yorkers" concluded the 1988 Citizens Union Report at p. 3, the issue of borough representation "involves their sense of themselves, of their neighborhoods and of their city."

D. The Voting Structure Of The Board Does Not Give Disproportionate Power To Any One Borough President. The Structure Appropriately Accounts for Local And City-Wide Interests.

In the District Court, appellees conceded that the Board of Estimate "is needed" and "works" (JA 547).[5] The District Court found that the Board had in fact furthered the important interests for which it was designed: facilitating the City's ability to exercise central authority while at the same time giving a meaningful voice to local interests; preserving historical, geographic, and political boundaries; maintaining a small, collegial and effective body of the City's highest elected officials; providing a check on mayoral powers (A 82-97). According to the District Court, the structure of the Board "has proven conducive to accomplishing the Board's mission" (A88).[6]

Appellees now wish to retreat from their earlier concessions and from the findings of the District Court. They wish to demean the effectiveness of the Board as a unifying force in the City. They attempt to do so by making an extraordinary allegation which they have never before attempted to prove. According to appellees' brief before this Court, the voting structure of the Board has "substantially advantaged the small boroughs" particularly by in-

[5] References to the Appendix to the Jurisdictional Statement will be preceded by the letter "A". Numbers preceded by the letters "JA" refer to the pages of the Joint Appendix.

[6] Appellees claim that the justifications proffered for the Board are just a "rehash" of those rejected by this court in *Andrews* v. *Koch*, 528 F. Supp. 246 (E.D.N.Y. 1981), *aff'd*, 688 F.2d 815 (2d Cir.), *aff'd mem. sub nom.*, *Giacobbe* v. *Andrews*, 459 U.S. 801 (1982). The main justification offered in *Andrews* was the desire to provide minority party representation on the City's legislative body—the City Council. That justification has nothing to do with the important interests furthered by the voting structure of the Board of Estimate. A secondary interest was the desire to give voice to borough-wide interests on the City Council. However, when the District Court rejected that justification, it specifically noted that one of the reasons for its rejection was the fact that the Board of Estimate provided a channel for the borough-wide perspective through the votes of the borough presidents. 528 F. Supp. at 251.

suring that Staten Island receives a disproportionate share of the City's resources (Appellees' Br. at 10).

Attempting to prove such an allegation would be difficult even in the appropriate forum — the District Court. It would require complete analysis of the City's very complex budgets over time and an examination of myriad other actions. Appellees' selective citation in an appellate brief of a few isolated budgetary items is not an "analysis" in any meaningful sense.

First, appellees compare the "administrative office budget" of the various boroughs (Appellees' Brief at 11-12). They do not mention that each borough president chooses to include different expenses within this rubric so that comparing "administrative office" budgets without a further analysis of functions tells nothing about actual allocation of resources.[7] Second, appellees cite a newspaper report to support an allegation of an "inverse relationship" in the "funding of public service programs" (Appellees' Brief at 12). What they appear to be referring to are relatively minor additions to the $16.7 billion expense budget for fiscal year 1984. Once again they do not say what is included in the category of "public service" programs in each of the boroughs so that comparisons are meaningless. Finally, they cite "similar disproportions" in capital spending (Appellees' Br. at 13). Here they compare capital budget expenditures in Staten Island in fiscal 1984 to capital expenditures in community districts they have selected in Brooklyn and Queens.

Not only are the expense budget figures selected by the appellees meaningless in themselves, but in sum they represent a minute portion of the City's 1989 $25-billion expense budget, a budget that makes provision for, among many other things, police, fire, sanitation and education services to the residents of the

[7] For example, in fiscal year 1989, the Bronx Borough President's budget contains an allocation of $700,000 for economic development purposes that in Brooklyn are principally funded through the Mayor's Office of Economic Development. Similarly, the Queens and Staten Island Borough Presidents are required to have large allocations for their Topography Units, which are not required to be as large in the other boroughs. This difference is not a reflection of varying political power, but rather reflects the greater need to map streets in those boroughs because they have more undeveloped land.

City. The provision of these services depends upon the need for them, not on the borough in which they will be provided. For example, the Police Department, with an annual budget exceeding $1 billion, deploys a greater number of police officers in Manhattan and Brooklyn, both in absolute numbers and in proportion to population, than it does in Staten Island or Queens.[8] Does this mean that the borough presidents of Manhattan and Brooklyn are wielding a disproportionate share of political power? Or does it mean that there is more need for police in these boroughs? Likewise, firefighters are deployed where they are needed, and other services are similarly allocated.

Similarly, when considering the capital budget, one cannot simply compare expenditures in different geographical areas and conclude that political power is proportionate to the size of the expenditure. First, expenditures vary from year to year. A large expenditure in one year may reflect a lack of expenditure in prior years. For example, if in one year there is a large capital outlay for water mains in Staten Island, does that reflect a disproportionate political power? Or does it reflect the fact that water mains have already been constructed in the other boroughs but not in Staten Island?

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[8] The 13,346 police officers deployed in precincts in Fiscal Year 1989 are distributed by borough as follows:

	S.I.	Queens	Brooklyn	Manhattan	Bronx
Officers Deployed	499	2563	4058	3998	2228
Percentage of Total	3.8%	19.3%	30.5%	30.0%	16.7%
Borough Percentage of City Population	5.0%	26.8%	31.6%	20.2%	16.6%

Police deployment in the three community districts in Staten Island and the three community districts in Brooklyn and Queens that appellees select for comparison in capital spending is as follows:

	S.I. Community Districts	Brooklyn Community Districts	Queens Community Districts
	1, 2, 3	3, 4, 16	8, 11, 13
Officers Deployed	499	844	475

Appellees also make the entirely unfounded assumption that all capital expenditures reflect desired benefits for the communities in which the expenditures are made. This assumption is false. Millions of dollars are being spent on the Fresh Kills landfill in Staten Island. This garbage disposal facility has been reviled by many of Staten Island's residents.[9] Does this capital expenditure reflect a disproportionate political power of the borough president on the Board of Estimate? Or does it reflect the fact that, contrary to the expressed interests of many citizens of Staten Island, its land is being used to benefit the entire city? Indeed projects like this make it imperative that the borough president of Staten Island have a meaningful voice on the Board. Without such a voice residents of that borough would find it even more difficult to accept such onerous capital expenditures for the good of the whole.

Appellees, after favoring the Court with this budget "analysis", then attempt to demonstrate that the "disproportionate power of Staten Island" also reduces its share of what appellees apparently consider to be undesirable projects. They assert that if votes "had been weighed proportionately to population", the "losers" of certain votes on the Board would have prevailed (Appellees' Br. at 14). One case cited is the construction of a resource recovery plant in Brooklyn. Appellees do not reveal that this was the first in a comprehensive program that would place such plants

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[9] A recent Article in the New York Times, September 10, 1988, p. 29, col. 1, describes the Fresh Kills facility as follows:

> Almost all that trash now comes to Fresh Kills—once a lush swamp that blue crabs called home, and now Earth's biggest dump. Sanitation officials project that by the turn of the century, Fresh Kills—already steep enough to schuss—will have grown to become the highest point on the Eastern Seaboard.
>
> It is grim almost beyond description. The stench recalls the festering, viscous bottom of a filthy garbage can. Hills where the stones and gravel have been spread over generations of refuse are eerily, lifelessly bare. Over newly arrived garbage, tens of thousands of gulls swarm crazily about, shrieking delight over their revolting fare. Here—at Fresh Kills—is where things, all things, end up.

in every borough. *See, e.g.*, Resolution of the Board of Estimate, dated December 20, 1984, Cal. No. 19. Nor do they mention that the decision was supported by a city-wide representative and four of the five borough presidents. In the two other instances cited, the construction of homeless shelters and subsidized middle-income condominiums, at least two city-wide representatives and two borough presidents voted in favor of the condominiums and all of the shelters.[4] Appellees also neglect to state that although no shelter was at that time voted for Staten Island, a new jail was slated for that borough. *See* Adopted Budget for Fiscal Year 1989 at 10C--Project No. C-143. Surely, having to sustain a jail (as opposed to a homeless shelter) does not demonstrate a disproportionate political power by the borough president of Staten Island.

E. The Courts Below Effectively Gave No Weight To The Decisions Of The State Concerning Which Structure Of Government Best Serves Important State Interests.

As noted above and in our main brief, the District Court found that the structure of the Board furthered very important state interests. After so finding, however, the Court effectively gave no weight to the interests. The Court applied a "least restrictive alternative" test under which the Board of Estimate could not be sustained if any other hypothetical structure of government with a lesser deviation could be said to further the same interests. In this calculus, a hypothetical argument about how a non-existent structure might possibly further state interests is given weight greater than the ninety years of experience which showed that the Board's structure did in fact further these interests. This method of analysis inevitably leads to the imposition of hypothetical structures upon real situations and crowds out the diversity and flexibility in local governmental units which is favored by this Court's one person, one vote jurisprudence.

Appellees do not attempt to justify this approach. Instead they say that we have mischaracterized what the District Court did. According to appellees, the courts below did not use a "least

[4] *See*, Resolutions of the Board of Estimate, dated August 19, 1987, Cal. Nos. 4, 6, 10, 11, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 27, 31, 33, 36; Minutes of the Board of Estimate Hearing of August 19, 1987.

restrictive alternative" test (Appellees' Br. at 45). We think it best to let the District Court speak for itself (A97-98):

> Validating the foregoing policies and interests [furthered by the Board's structure] lightens but does not relieve defendants of their burden of justification. They must also demonstrate that no alternative plan would satisfactorily embrace the legitimate considerations and diminish the deviation. If another alternative would do so, then the present plan "may [not] reasonably be said to advance" the accepted goals. *Mahan* v. *Howell*, 410 U.S. at 328.

Id. 97-98. The Court of Appeals adopted this holding without comment (A39).

No decision of this Court authorizes such a rule. It is both bad law and bad policy because it removes from the states and localities the ability to choose from among various options the form of government best suited to the needs of the locality. The rule applied below transforms the equal protection clause into a "uniform straitjacket [to] bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems." *Avery* v. *Midland County*, 390 U.S. 474, 485 (1968).

CONCLUSION

THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE REVERSED AND THE CASE REMANDED WITH INSTRUCTIONS TO ENTER JUDGMENT DECLARING THAT SECTIONS 61 AND 62 OF THE NEW YORK CITY CHARTER ARE VALID.

New York, New York,
September 27, 1988

Respectfully submitted,

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Nos. 87-1022, 87-1112

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1987

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of New York, ANDREW STEIN, individually and as City Council President, HARRISON J. GOLDIN, individually and as Comptroller for the City of New York, HOWARD GOLDEN, DAVID N. DINKINS, FERNANDO FERRER, CLARE SHULMAN, RALPH J. LAMBERTI, each individually and as Borough Presidents of the boroughs of the City of New York,

Appellants,

-and-

ROBERT A. STRANIERE, individually and as a member of the New York State Assembly,

Intervenor-Appellant,

-against-

BEVERLY MORRIS; JOY CLARKE HOLMES; JOANNE OPLUSTIL,

Appellees.

FRANK V. PONTERIO,

Intervenor-Appellant,

v.

BEVERLY MORRIS, JOY CLARKE HOLMES, and JOANNE OPLUSTIL,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF APPELLANT FRANK V. PONTERIO

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16 pp

QUESTION PRESENTED FOR REVIEW

Whether the combination of at-large and local members of the Board of Estimate in the context of the voting procedures of the Board, creates a system of representation that satisfies constitutional standards for instruments of local government.

THE PARTIES TO THE PROCEEDINGS BELOW

The following parties and *amici curiae* participated in the proceedings before the Court of Appeals:

(i) *Plaintiffs-Appellees:* Beverly Morris, Joy Clarke Holmes, Joanne Oplustil

(ii) *Defendants-Appellants:* THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of New York, ANDREW STEIN, individually and as City Council President, HARRISON J. GOLDIN, individually and as comptroller for the City of New York, HOWARD GOLDEN, DAVID N. DINKINS, FERNANDO FERRER, CLARE SHULMAN, RALPH J. LAMBERTI, each individually and as Borough Presidents of the boroughs of the City of New York,

(iii) *Intervenor-Defendant-Appellants:* Frank V. Ponterio; Robert A. Straniere, individually and as a member of the New York State Assembly

(iv) *Amici Curiae:* John J. Marchi, John F. Banzhaf III, Staten Island League for Better Government, Citizens Union of the City of New York, Peter F. Vallone and other members of the New York City Council

The Municipal defendants and intervenor Strainere have joined in a separate, companion appeal to this Court.

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In The
Supreme Court of the United States
October Term, 1987

FRANK V. PONTERIO,
Intervenor-Appellant,

v.

BEVERLY MORRIS, JOY CLARKE HOLMES, and JOANNE OPLUSTIL,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF APPELLANT FRANK V. PONTERIO

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit, dated October 8, 1987, is reported at 831 F.2d 384 (A5)[1].

The decisions of the United States District Court for the Eastern District of New York, dated August 21, 1984 and November 16, 1986, are reported at 592 F.Supp. 1462 and 647 F. Supp. 1463 (A55, A119).

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1. Numbers in parentheses preceded by the letter "A" refer to pages in the Appendix submitted with the Jurisdictional Statement. Numbers in parentheses preceded by the letters "JA" refer to pages in the Joint Appendix.

The trial court's rulings came upon remand from the Court of Appeals for the Second Circuit, which, in a decision dated May 16, 1983, held that the New York City Board of Estimate is subject to the one-person, one-vote principle. This decision, which reversed the initial judgment entered by the trial court, is reported at 707 F.2d 686 (A186).

The first decision of the United States District Court for the Eastern District of New York is reported at 551 F. Supp. 652 (A208).

JURISDICTION

Alleging that the composition and voting structure of the New York City Board of Estimate, as set forth in sections 61 and 62 of the New York City Charter, violates the equal protection clause of the United States Constitution, plaintiffs-appellees Morris, *et al.* sought declaratory and injunctive relief pursuant to 28 U.S.C. Sections 2201 and 2202. Appellees predicated jurisdiction in the trial court upon 28 U.S.C. Sections 1331 and 1343.

The judgment of the United States Court of Appeals for the Second Circuit was entered on October 8, 1987 affirming the trial court's grant of plaintiffs' motion for summary judgment.

A Notice of Appeal to this Court on behalf of Intervenor-Defendant-Appellant Frank V. Ponterio was timely served and filed in the Court of Appeals for the Second Circuit on December 16, 1987. The municipal appellants and Intervenor-Defendant-Appellant Robert A. Straniere served and filed notices of appeal on October 15, 1987 and November 6, 1987 respectively.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. Section 1254(2) in that the Court of Appeals held a state statute to violate the United States Constitution.

CONSTITUTIONAL PROVISION AND STATE STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The New York City Charter:

Section 61: *Membership.* The mayor, the comptroller, the president of the Council, and the presidents of the boroughs shall constitute the board of estimate.

Section 62: *Voting in the board.*

a. As members of the board of estimate, the mayor, the comptroller and the president of the council shall each be entitled to cast two votes, and the president of each borough shall be entitled to cast one vote.

b. Except as otherwise provided in this charter or by law, the board shall act by resolution adopted by a majori-

ty of the whole number of votes authorized to be cast by all the members of the board.

c. No resolution or amendment of any resolution shall be passed at the same meeting of the board at which it is originally presented unless by a three-fourths vote or shall be finally passed except at a meeting open to the public. Prior to a final vote by the board on any resolution or amendment of any resolution members of the general public shall be afforded the opportunity to be heard on such resolution or amendment.

d. A quorum of the board shall consist of a sufficient number of members thereof to cast six votes, including at least two of the members authorized to cast two votes each.

ARGUMENT

Appellees appear determined to misrepresent the record in this case. Once again, in response to Ponterio's argument that summary judgment was improperly granted and affirmed, Appellees assert that Ponterio agreed by stipulation to proceed in the District Court without a hearing on methodology issues (Appellees' Brief at p. 16, n. 38). As previously noted in Ponterio's brief opposing Appellees' motion to affirm, that stipulation concerned only the justification phase of the proceeding, not the methodology phase. Moreover, Appellees' argument is absurd on its face. The stipulation is dated February 13, 1985 (JA 403), six months after the District Court surprised all parties by issuing its Memorandum and Order adopting the unmodified *Abate* methodology and foreclosing any opportunity for testimony on methodology issues (A640).

POINT I

APPELLEES' CRITICISM OF THE DISTRICT VOTING POWER METHODOLOGY IS BASELESS

Appellees are in a quandary with regard to their approach to district voting power analyses. It was they who first suggested that such analyses be applied to the Board and admitted that district voting power apportionment is an acceptable means of implementing constitutional one person, one vote principles (A842, 847). That admission was made at a time when Appellees were misguided by the erroneous calculations of their expert, Brams, into believing that a district voting power analysis of the Board showed an excessive deviation and thus bolstered their *Abate*-analysis conclusions. Now that Ponterio's correct district voting power analyses show a markedly smaller and, Ponterio contends, a constitutionally acceptable deviation, Appellees have changed their tune. They now argue that the apportionment method applied to 24 of New York State County boards of supervisors is inapplicable to the Board of Estimate because while City government is large it is not regional (Appellee's Brief at p. 9). To support this exercise in casuistry Appellees also attempt to infuse the argument with "facts" concerning the importance of boroughs that are unsupported by any competent testimony in the record (Appellees' Brief at pp. 8-10).

Next, Appellees attempt to misrepresent the methodology of district voting power analysis so as to inflate the deviations for the Board as currently configured. District voting power deviations, as computed in the 24 New York State counties employing this apportionment method and, as approved by the Second Circuit and left undisturbed by this Court in the Nassau County cases, is

simly the difference between a district's voting power (expressed as a percent of total voting power) and that district's relative population (expressed as a percent of total population). See, *Iannucci v. Board of Supervisors,* 20 N.Y. 2d 244 (1967), *League of Women Voters v. Nassau County Board of Supervisors,* 737F. 2d 155 (2d Cir. 1984), and *Franklin v. Krause,* 32 N.Y.2d 234 (1973) *appeal dismissed,* 415 U.S. 904 (1974). Appellees instead compute deviations by expressing this difference as a percent of the normal or ideal district voting power i.e., as a percent difference of percent differences (Appellees' Brief at p. 24, n. 45). Thus the true deviations of - 5.02% for Brooklyn and + 6.53% for Staten Island (Simple majority-vote case for the full Board) become $\frac{-5.02}{13.72}$ x 100% = -36.59% and $\frac{+6.53}{2.17}$ x 100% = 300.92%. The maximum deviation consequently grows from 11.55% to 337.51%. This is pure sophistry. Appearing as in expert for defendants in *League*, another of Appellees' experts, Lee Papayanapoulos, defined the methodology as Ponterio applied it not as Appellees now argue (A946). Furthermore, Appellees' computation method was proposed in *League* and explicitly rejected by the Second Circuit. *League,* 737 F 2d at 168.

A compelling reason to reject Appellees' methodology argument may also be found by application of common sense. When computed as in the New York County cases, including *League* and *Franklin,* the voting-power deviations share a feature in common with *Abate*-analysis deviations, i.e., a given percent deviation has the same significance regardless of the relative population of the district it describes. For example, a 10% deviation from ideal for Staten Island (about 5% of the City population) would be evaluated as no more or less serious than a 10% deviation from ideal for Brooklyn (about 32% of the City population). One could make a cogent argument that

a given percent deviation should be considered as a more serious malapportionment indicator the greater the relative population it affects. It is nonsense to suggest that a given percent deviation is more serious the *fewer* people it affects. But that is precisely the consequence of applying Appellees' computation protocol. Moreover, this Court has recognized that even a substantial malapportionment may be tolerated if its overall, incremental effect is minimal, i.e., if it indicates misrepresentation of a small fraction of the total population. *Brown v. Thomson,* 462 U.S. 835 (1983).

Finally, Appellees argue that a methodology used for two decades in New York State and well understood by the State trial and appellate courts is too complicated to be understood by the Supreme Court of the United States (Appellees' Brief at p.36, n.58). Such a bizarre accusation is understandable in light of Appellees' self-contradictory arguments and their demonstrated inability to understand high-school algebra. Compare e.g. Appellees' unqualified endorsement of district voting power apportionment and the concept of critical votes (A 838-39, 345-47) with their outright rejection of them (Appellees' Brief at pp. 31-3). Of course it is the very existence of each member's critical vote that involves him in the formation of majority coalitions. Who would seek the support of a member whose vote doesn't matter? In the latest example of their lack of understanding, Appellees present an incorrect computation of citizen voting power deviation for the mayorless Board as would be determined following the City defendants' methodology (Appellees' Brief at p.24, n. 45). Appellees show a 49.36% deviation. Although the details of the calculation are not presented, the resultant deviation matches that obtained by *amici curiae* Peter F. Vallone, et al who do present the computation details (Amici Brief at

p. 14). *Amici* and Appellees err in this calculation by using the member voting powers applicable to the full Board (18.84% for city-wide members and 8.7% for borough presidents) instead of the mayorless Board. For the mayorless Board, the respective voting powers are 23.08% and 10.77%. The complete, correct computation applicable to the mayorless Board is presented in Exhibit A. The resultant deviation, previously provided by Ponterio to the Second Circuit, is 41.41%. See letters, Barbara A. Ponterio to Hon. James Oakes, Jon Newman, and Lawrence Pierce dated May 8, 1987 and May 11, 1987. (When the May 8, 1987 letter was written, Ponterio had not seen the City defendants' response and he assumed that they would submit a proper computation. They did not. That is the reason for the seeming disparity between the May 11 letter and asterisk note in the May 8 letter).

POINT II

APPELLEES'BUDGET ALLOCATION ANALYSES DO NOT SUPPORT THEIR CLAIM THAT STATEN ISLAND'S INFLUENCE ON BOARD DECISIONS IS EXCESSIVE

Appellees argue that Staten Island receives a disproportionate share of City resources, which Appellees measure as per capita allocations of certain minor budget items (Appellees' Brief at pp. 11,12). Simply put, Appellees contend that one person, one vote must translate into one person, one dollar. Nowhere in law or logic is there any basis for such an outlandish proposition. It is axiomatic that the function of local government is to meet the needs of its people, not to ensure a uniform dole of the public fisc. Appellees compound their misunderstanding by seizing upon the administrative budgets of the Borough Presidents to prove their point. To place this argument in

proper perspective it should be noted that the total of these administrative budgets is about $28 million, or about 0.1% of the total City budget of $26.5 billion. Most of this total budget is allocated to contractual obligations and salaries of City employees and is virtually beyond any control of the borough presidents. As for their argument on allocation of so-called public service programs, once again Appellees are mistaken. These budget items for the most part are for services performed by community agencies under contract to City departments (e.g., Youth Bureau, Human Resources Administration, Department for the Aging) and, with few exceptions, funding decisions are made by central city agencies, not the borough presidents. More appropriate comparisons show that Staten Island, with 5% of the City population, receives about 3% of the almost $5 billion Social Services Dept. budget, 3.8% of the $1.3 billion Police Dept. budget, and is the only borough with no City hospital. Staten Island does not complain about being short-changed on these allocations but rejoices because this disproportionality indicates that Staten Island has relatively fewer jobless, homeless, and criminals.

It is on the contention that Staten Island receives a disproportionate share of the capital budget that Appellees commit their most grievous error. Staten Island is home to only 5% of the City population but it accounts for over 20% of the City land area, is the only borough with a substantial amount of undeveloped land, and the only borough with an expanding population. Some 20-30% of its residents are not served by sanitary and storm sewer systems, and by rough count there are over 80 miles of unpaved and undeveloped public streets. By contrast, one can search high and low on Manhattan and not find a septic tank or dirt road. One might ask, how does it happen that in 90 years, Staten Island with all its alleged

excessive governmental power has remained alone among the boroughs in its lack of these basic municipal facilities? If Appellees' argument demonstrates anything it is that their understanding of City government is superficial and that Staten island, even with its equal vote, has been denied fair budget access for decades. Only after the other boroughs have been fully developed, has it finally become Staten Island's turn. In the final analysis, the best way to treat these budget figures is to ignore them. Bottom-line allocations cannot logically be used to induce anything certain about the process that produced them. Disproportionate governmental power can no more be proved by disproportionate per capita allocations alone than gerrymandering can be proved by disproportionate election results alone.

Finally, Appellees claim that Staten Island's excessive power on the Board is evidenced by the vote outcomes of the Board on the location of an incinerator plant, homeless shelters, and subsidized housing (Appellees' Brief at pp. 13, 14) Appellees' claim is based on half-truths. Incinerator plants were approved in all boroughs. The vote referred to by Appellees concerned where to build the first one. With regard to the homeless shelters, Appellees conveniently fail to note that in exchange for excluding Staten Island as a shelter site, Staten Island agreed to accept a 1,000-inmate jail, the largest on the mainland of any borough.

Moreover, Appellees again demonstrate their self-contradiction by attempting to prove their point using the very same district voting power apportionment analyses they elsewhere contend are invalid. They argue that these

vote outcomes would have been reversed if Board votes (they really mean voting powers) were apportioned according to population. Furthermore, their conclusions are mere speculation. The coalitions described would have a combined voting power of slightly more than 48.6% if voting power were apportioned with mathematical perfection. Obviously, acceptably small deviations from mathematically perfect apportionment could easily result in these coalitions having over 50% voting power. Moreover, a slight shift in the division of voting power between the city-wide and borough members could also result in these coalitions having over 50% voting power.

CONCLUSION

The decision of the Second Circuit Court of Appeals should be reversed.

September 22, 1988

Respectfully submitted,

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EXHIBIT A

CITIZEN VOTING POWER CALCULATION
(for 5-vote majority of a mayorless Board)

Note: The following member designations are used:

CW - a city-wide Board member (2 votes)

BP - a borough president (1 vote)

Decisive votes occur only in vote totals of 3,4,5, and 6. Borough Presidents have decisive votes only in vote totals of 4 and 5. City-wide members' votes are decisive in vote totals of 3,4,5, and 6.

The number of distinct groups of r members that can be formed from a total population of n members is equal to:

$$\frac{n!}{r!(n-r)!}$$

For each possible group size, the corresponding values are:

City-wide Members		Borough Presidents	
Group Size	# of Groups	Group Size	# of Groups
0	1	0	1
1	2	1	5
2	1	2	10
		3	10
		4	5
		5	1

The number of distinct groups of combinations of city-wide members and borough presidents is equal to the product of the number of groups of city-wide members and the number of groups of borough presidents. For example, for a combination of 1 city-wide member and 3 borough presidents, there are 2 x 10 or 20 distinct groups of the combination. The computations of decisive votes and resulting member voting powers are shown in Table A-1.

TABLE A-1

Vote Total	Voting Combinations	No. of Combination Groups	No. of CW Members with Decisive Votes	No. of BPs with Decisive Votes	Total of CW Decisive Votes	Total of BP Decisive Votes	Total of All Decisive Votes
3	1 CW + 1 BP	2 x 5 = 10	1	0	10	0	10
3	0 CW + 3 BP	1 x 10 = 10	2	0	20	0	20
4	2 CW + 0 BP	1 x 1 = 1	0	5	0	5	5
4	1 CW + 2 BP	2 x 10 = 20	1	3	10	60	80
4	0 CW + 4 BP	1 x 5 = 5	2	1	20	5	15
5	2 CW + 1 BP	1 x 5 = 5	2	1	20	5	15
5	1 CW + 3 BP	2 x 10 = 20	1	3	10	60	80
5	0 CW + 5 BP	1 x 1 = 1	0	5	0	5	5
6	2 CW + 2 BP	1 x 10 = 10	2	2	20	0	20
6	1 CW + 4 BP	2 x 5 = 10	1	4	10	0	10
	Totals:	92			120	140	260

Aggregate voting power of CW members $= \frac{120}{260} = 46.15\%$

Voting power of each CW member = 46.15% ÷ 2 = 23.08%

Aggregate voting power of borough presidents $= \frac{140}{260} = 53.85\%$

Voting power of each borough president = 53.85% ÷ 5 = 10.77%

Supreme Court, U.S.
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Nos. 87-1022, 87-1112

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of the City of New York, et. al.,
Appellants,

v.

BEVERLY MORRIS, et. al.,
Appellees.

FRANK PONTERIO,
Appellant,

v.

BEVERLY MORRIS, et. al,
Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICUS CURIAE PROF. JOHN BANZHAF IN PARTIAL SUPPORT OF APPELLANT

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June 13, 1988

QUESTIONS PRESENTED

1. In a reapportionment case involving a municipal body -- here, the New York City Board of Estimate -- in which some voting members are elected at large and others are elected from districts (boroughs), may the court adopt, as a measure of the "voting strength for each voter," a test which ignores the effect on voting power of the at-large members who cast an absolute majority of the total votes on the body; and by so doing prevent municipalities from using at-large district members, flotorial district members, and other techniques to reduce disparities arising from differences in population between the single-member districts?

2. In such a proceeding may the court, without even holding a hearing, dismiss a long-established, scientifically valid, and generally accepted method of computing voting power in many different voting systems, only to mandate one not designed for legislative bodies with both district- and at-large voting members, and which itself fails to satisfy the very criteria the court announced in rejecting the established theory?

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INTEREST AND QUALIFICATIONS OF AMICUS

Amicus John F. Banzhaf III is a Professor of Law at the National Law Center of the George Washington University in Washington D.C. who has previously been involved in numerous legal proceedings concerning issues of interest to the public.[1] He earned a technical degree from M.I.T., has published several technical papers, and obtained two U.S. Patents.

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[1] See, e.g., Banzhaf v. F.C.C., 405 F.2d 1082 (DC Cir. 1968) (Fairness Doctrine applied to cigarette commercials); Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (3-judge, DC 1968) (upholding Congressional ban on cigarette commercials); Action on Smoking and Health v. C.A.B., 699 F.2d 1209 (DC Cir. 1983) (strengthening protections for nonsmoking airline passengers); United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973) (standing to challenge nationwide environmental harm); Campbell Soup Co., 77 F.T.C. 664 (1970) & Firestone Tire & Rubber Co., 81 F.T.C. 398 (1971) (establishing corrective advertising); Banzhaf v. Smith, 588 F. Supp. 1489 & 1498, rev'd on other grounds, 737 F.2d 1167 (DC Cir. 1984) (mandating appointment of "Special Prosecutor"); Agnew v. State of Maryland, 446 A.2d 425 (1982) (recovering, for the state, money unlawfully received).

In law school, Banzhaf developed a technique for measuring voting power[2] based upon principles widely established in the fields of mathematics and political science. He first applied it to weighted voting systems,[3] and proved to scholars in the field,[4] and to New York's

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[2] Now generally known as the "Banzhaf Index." See: Simulation of Weighted Voting: The Banzhaf Index, BYTE, March 1984, at 138; Mathematical Properties of the Banzhaf Power Index, Rand Study; The Banzhaf Index for Multi-Candidate Presidential Elections, presented at the 1981 SIAM National Meeting; discussed in "The Games Scholars Play," Newsweek, Sept. 6, 1982.

[3] See Banzhaf, Weighted Voting Doesn't Work: A Mathematical Analysis, 19 Rutgers L. Rev. 317 (1965).

[4] For example, four of the leading scholars in the field of measuring voting power submitted affidavits supporting Prof. Banzhaf's techniques for analyzing voting power in weighed voting cases. These include Prof. William H. Riker, Chairman of the Department of Political Science at the University of Rochester; Prof. Samuel Krisler, Prof. of Political Science of the University of Minnesota; Dr. Lloyd S. Shapley, Senior Research Mathematician of the RAND Corp.; and Mr. Irwin Mann, Instructor in Mathematics at the Courant Institute of Mathematics at New York University, and consultant to the RAND Corp.

highest court,[5] that previous court decisions which had not used his technique to analyze the distribution of voting power were invalid. Subsequently the technique of analysis was extended, and applied to the Electoral College (for electing the President)[6] where it was widely accepted,[7] to multi-member

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[5] Iannucci v. Board of Supervisors, 220 N.Y. 2d. 244, 229 N.E. 2d. 195, 282 N.Y.S.2d 502 (1967).

[6] Banzhaf, 3.312 Votes, A Mathematical Analysis of the Electoral College, 13 Villanova L. Rev. 303 (1968).

[7] See, e.g., Electoral College Reform, Hearings before the Committee on the Judiciary, House of Representatives, p. 306-74; Election of the President, Hearings before the Subcommittee on Constitutional Amendments, U.S. Senate, p. 517-42, 904-33; Pierce, The People's President, Section O entitled "Computer Analysis of Large versus Small State Power in the Electoral College" at 362 (1968); Michener, Presidential Lottery, Part C entitled "The Banzhaf Studies" at 220 (1969); Editorial, The Washington Post, Dec. 31, 1967; Editorial, The New York Times, Dec. 18, 1968; Editorial, St. Louis Post-Dispatch, Nov. 24, 1968.

districting, and to other voting systems.[8]

As set forth hereinafter in the BRIEF STATEMENT OF THE CASE, Prof. Banzhaf used his technique to calculate the disparities in voting power among voters in the different boroughs of New York City [NYC] under the Board of Estimate, and participated as amicus curiae before the Court of Appeals below.

Amicus Banzhaf argues that the courts below erred in rejecting his and other similar techniques of analysis out-of-hand and without an evidentiary hearing, and in adopting instead one which rules out completely the effect on voting power -- under the current system or any which NYC may try to adopt -- of legislators

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[8] See Banzhaf, Multi-Member Electoral Districts--Do They Violate the "One Man, One Vote" Principle?, 75 Yale L.J. 1309 (1966); Banzhaf, One Man, ? Votes: Mathematical Analysis of Voting Power and Effective Representation, 36 Geo. W. L. Rev. 808 (1968); Banzhaf, Mathematics, Voting, and the Law: The Quest for Equal Representation, Prepared for the International A.P.P. Conference on Mathematical Theory of Committees and Elections, Institute for Advanced Studies and Scientific Research, Vienna.

elected at-large, or from other equal-population districts.

He therefore urges reversal, but takes no position as to whether the current system is constitutional. He suggests, however, that the extent of the voting power disparities, and the justifications for them, should be evaluated under a system or test -- his or some other[9]-- which comports with reality and common sense, with the vast body of scientific learning in the field of the measurement of voting power, and which does not ignore the obvious effect of the at-large legislators on decreasing the disparities in voting power among borough residents.

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[9] For example, another system very similar to the Banzhaf Index, called the "Shapley-Shubik Index," has also been used to evaluate voting power in certain contexts, see Shapley & Shubik, A Method for Evaluating the Distribution of Power in a Committee System, 48 Am. Pol. Sci. Rev. (1954). However, the results obtained using this analysis are very similar to those using the "Banzhaf Index," see Mann & Shapley, Values of Large Games IV: Evaluating the Electoral College by Monte Carlo Techniques (RAND Corp. Memo RM-2651, Sept. 19, 1960); Mann & Shapley, Values of Large Games VI: Evaluating the Electoral College Exactly (RAND Corp. Memo RM-3158-PR, May 1962).

Therefore, he suggests, the Court should reverse the lower courts' finding -- based solely on the Abate test -- that the Board is unconstitutionally constituted. Alternatively, the Court may be able to determine that the Board is unconstitutionally constituted, under either the Abate test or the Banzhaf Index,[10] but require the district court on remand to at least consider methods other than the Abate test in evaluating alternatives which New York City may wish to propose.

BRIEF STATEMENT OF THE CASE[11]

New York City's Board of Estimate is comprised of eight members: three elected at large and casting two votes each on non-budgetary issues,[12] and the

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[10] An analysis of the deviations in voting power under the current NYC Board of Estimate, calculated using the Banzhaf Index, is set forth in note 3, 831 F.2d 384, 386-87; REPRINTED, APPENDIX III.

[11] Because Amicus does not have access to the Joint Appendix or to the record, no references are made to these documents.

[12] On budget matters, the mayor has a veto, but casts no vote.

presidents of each of the five boroughs, each casting one vote. Because the borough of Staten Island has far fewer residents than the other boroughs, the Board was challenged on reapportionment grounds.

The district court initially ruled against the plaintiffs, holding that the Board did not have to comply with the "one man, one vote" mandate because it was neither an elective nor legislative body, 551 F. Supp. 652 (E.D.N.Y. 1981). In reversing that decision, the Court of Appeals directed the lower court to determine on remand:

"whether the combination of at-large and local seats, in the context of the voting procedures of the Board, creates a system of representation that satisfies constitutional standards for instruments of local government," Morris v Board of Estimate, 707 F.2d 687, 690 (2d Cir. 1983) [Emphasis added].

The Court of Appeals was very careful to point out that:

"the fact that three members of the Board are elected at large from the entire city raises novel issues as to how an individual voter's opportunity to elect these members should be assessed in conjunction with his opportunity to elect his borough representative," Ibid., Fn 3. [Emphasis added].

The appellate court also specified exactly what the relevant test and criteria were to be:

"whether 'the guarantee of equal voting strength for each voter [which] applies in all elections of governmental officials is violated by the present electoral scheme.'" Id. at 691. [Emphasis added].

On remand the district court, faced with a bewildering variety of ad hoc and post hoc analyses of the disparities in voting power,[13] each attempting to deal with the unusual legislative situation which combined legislators elected at large with those elected from individual districts [boroughs], adopted the so-called "unmodified Abate test"[14] -- a

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[13] Appellees proposed, in their complaint and initial motion for summary judgment, at least a half dozen different methods for computing the extent of the discrimination they alleged, while intervenor-appellant Ponterio proposed many others.

[14] "[T]he court holds, as to the first stage issues, that the Supreme Court's methodology in Abate v. Mundt, 403 U.S. 182 (1971), is the appropriate standard. . .", Morris v. Board of Estimate, 592 F. Supp. 1462, 1464 (E.D.N.Y. 1984); "The remaining

test said to derive from Abate v. Mundt, 403 U.S. 182 (1971), a case which did NOT involve such a combination. Under this standard, all votes and all voting power related to any at-large Board members must be ignored.[15]

Subsequently, Prof. Banzhaf moved for leave to file a brief amicus curiae setting forth the disparities in voting power analyzed according to his established methodology. However, the district court refused to accept the

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methodological question, then, is whether the Abate test must be modified to account for the at-large representation. . . The court, nonetheless determines conversion unnecessary." Id. at 1470.

[15] As the lower court's calculations and discussion of the issue make plain, so long as the borough representatives have equal voting power, the only factor used in calculating the disparities in citizen voting power is the population of the boroughs. See, e.g., "Simply stated, the question is whether the allocation of an equal number of at-large Council seats to each of the five boroughs, without regard to substantial population disparities, comports with the constitutional rule of substantial numerical equality," Id. at 1466.

brief as untimely,[16] and more than five months later reaffirmed its earlier decision that the effect on citizen voting power of any at-large Board members must be ignored in calculating disparities in voting power.[17]

The Court of Appeals affirmed, holding that the Abate test should be used for reasons of "convenience"; "precedent"; because "at-large members represent voters as city residents"; and because the Banzhaf Index is calculated independently of certain political factors such as party affiliations, Morris v. Board of Estimate, 831 F.2d 384, 386, 390 (2d Cir. 1987). It also purported to base its decision in part on language in this Court's decision in Whitcomb v. Chavis, 403 U.S. 124 (1971), see 831 F.2d 385, 389.

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16 Morris v. Board of Estimate, 647 F. Supp. 1463, n. 1 at 1465 (1986). THE AMICUS BRIEF WAS DATED JUNE 30, 1986.

17 "[T]he Board also can be gauged by the Abate test--irrespective of the at-large representation," Id. at 1468 [emphasis added]; "The at-large representation should be eliminated from the deviation computation," Id. at 1475. THE DISTRICT COURT'S OPINION IS DATED NOVEMBER 19, 1986.

SUMMARY OF ARGUMENT

I. AS THE COURT BELOW APPEARS TO ADMIT, NO CONSTITUTIONAL TEST OF CITIZEN VOTING POWER IN REAPPORTIONMENT CASES CAN LOGICALLY AND IN FAIRNESS IGNORE THE EFFECTS OF AT-LARGE LEGISLATORS. 12

II. "CONVENIENCE," "PRECEDENT" WHICH NEVER CONSIDERED THE ISSUE, AND THE ALLEGEDLY DIFFERENT ROLES OF AT-LARGE AND DISTRICT- LEGISLATORS, ARE INSUFFICIENT REASONS FOR REJECTING AN ESTABLISHED ANALYTICAL TECHNIQUE, AND ADOPTING AN UNSUITED ONE WHICH DOES NOT MEET THE COURT'S OWN CRITERIA 18

III. THE COURT'S DETERMINATION IN WHITCOMB V. CHAVIS WAS NOT THAT THE BANZHAF INDEX WAS INAPPROPRIATE IN DETERMINING VOTING POWER DISPARITIES, BUT RATHER THAT NO SINGLE MATHEMATICAL ANALYSIS -- BY ITSELF -- SHOULD OVERCOME THE PRESUMPTION OF CONSTITUTIONALITY OF A MUNICIPAL VOTING SYSTEM, AND THE FLEXIBILITY TO WHICH LOCAL GOVERNMENTS ARE ENTITLED UNDER OUR FEDERAL SYSTEM 57

I. AS THE COURT BELOW APPEARS TO ADMIT, NO CONSTITUTIONAL TEST OF CITIZEN VOTING POWER IN REAPPORTIONMENT CASES CAN LOGICALLY AND IN FAIRNESS IGNORE THE EFFECTS OF AT-LARGE LEGISLATORS.

If New York City's Board of Estimate were made up only of the five borough presidents, each casting one vote, the disparities in voting power between a resident of Brooklyn (pop. 2,230,936) and of Staten Island (pop. 352,121) would obviously be hugh. On the other hand, as Judge Newman correctly states in his concurrence, no one could logically find disparities of constitutional magnitude if, in addition to the five borough presidents, 100 legislators elected from districts of equal population were added.[18] Presumably the same result would occur if 100 legislators, all elected at large from equal-sized districts, were added to the five borough

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[18] "If a body included 100 at-large members, for example, the existence of one representative from each of five districts [boroughs] of different populations could not seriously be thought to offend constitutional standards." 831 F.2d at 394.

presidents to compose a new larger Board of Estimate.[19]

Yet, under the unmodified Abate test mandated for all district courts in the Second Circuit, the deviations in voting power between citizens of the different boroughs would be as hugh (and presumably as unconstitutional), since the analysis ignores any legislators other than the borough representatives, and is independent of how the voting power is divided on the Board between the at-large

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[19] If there is any doubt that adding 100 legislators, either elected at large or from equally populous districts, would significantly reduce disparities in voting power between residents of the five boroughs, consider a hypothetical (but obviously impractical) Board composed on five borough presidents, and of 100,000 legislators elected from equally-populous districts. Can there be any doubt that, compared with a citizen's ability to affect his representative elected from a micro-district of approximately 70 people, his relative ability to also affect a representative from a district of 352,121 [Staten Island] or 2,230,936 [Brooklyn] is totally insignificant and of no legal consequence!

members and the borough presidents.[20]

Indeed, even in the most extreme situation where all of the borough presidents (together or separately) are totally powerless and the equivalent of nonvoting observers -- i.e., where the 3 at-large members each cast 100 votes, and the borough presidents cast only 1 vote each! -- the majority is willing only to admit that "a different result might be required," and finds "it unnecessary to speculate on the test to be applied in such a case," 831 F.2d 384, n. 5 at 389 [emphasis added]![21]

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[20] Currently, the three at-large Board members cast 2 votes each. Their share of the voting power on the Board can be increased by allowing them each to cast 3 votes, or decreased by allowing them to cast only 1 vote each. Under the Abate test, however, even dramatically increasing the voting power of the at-large members -- in effect, shifting some of it from the borough presidents to the city-wide members -- would have no effect on the calculation of voting power disparities.

[21] Ironically, in the same footnote, the Court of Appeals says of the other cases which likewise have involved a mixture of at-large and district-legislators: "First, the exclusion in each of these cases of at-large members

Such an approach not only flies in the face of logic, common sense, and basic postulates in the fields of mathematics and political science, but is totally unnecessarily, violates the principles of flexibility and federalism, and places local municipal bodies in a reapportionment straightjacket. This Court has said:

"viable local governments may need considerable flexibility in municipal arrangements if they are to meet changing societal needs," Abate v. Mundt, 403 U.S. 184, 185 (1971), quoting Sailors v. Board of Education, 387 U.S. 105, 110-111 (1967) [emphasis added]

"[T]he Constitution and this Court are not roadblocks in the path of innovation, experiment, and development among units of local government." Avery v. Midland County, 390 U.S. 474 (1968). [emphasis added]

Indeed, as the Court of Appeals below itself recognized:

"In connection with the present structure of the Board it is important to recognize that the Supreme Court has repeatedly endorsed innovative approaches to local

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from an analysis of voter inequality--when their inclusion would clearly affect the level of inequality eventually found . ." 831 F.2d 384, n. 5 at 389 [emphasis added].

government, devised by local officials to meet local needs." 707 F.2d 686 at 691.

Yet the effect of this ruling, if affirmed by this Court, would be to prohibit New York City and all other municipal bodies from using innovative approaches such as legislators elected at large, legislators from flotorial districts, and even legislators elected from equal-population districts, to offset whatever disparities there may be when local governmental units (such as boroughs) are each given at least a tiny (and equal) voice on municipal legislative bodies.

By mandating compliance with the unmodified Abate test, denying -- without even a hearing -- the validity of any other possible mathematical justification for the Board of Estimate, and refusing even to speculate on what test might apply even if the City were -- through weighted voting, for example -- to reduce the effective voting power of the borough presidents even to zero, the Court of Appeals goes beyond what the Constitution seems to require to guarantee Equal Protection. Its ruling would effectively

prohibit the city from seeking to remedy the finding of malapportionment by:

1. increasing the number of legislators elected at large;

2. increasing the number of weighted votes allocated to legislators elected at large;

3. adding legislators elected from newly-created single-members districts of equal population, and/or giving them substantial numbers of weighted votes;

4. adding new legislators elected by residents of the six different combinations of boroughs other than Staten Island,[22] and even giving them large numbers of weighted votes;

or by any combination of these and other possible techniques, each of which undoubtedly does reduce the disparity in voting power which now exists between residents of different boroughs.

In short, it is the effect of the decision below establishing one and only one test for constitutionality, and mandating only one out of many techniques

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[22] E.g., Bronx-Queens, Bronx-Brooklyn, Bronx-Manhattan, Queens-Brooklyn, Queens-Manhattan, and Brooklyn-Manhattan.

of compliance,[23] which Amicus suggests is contrary to logic, common sense, and to the need for "flexibility" and "innovative approaches" which this Court has always stressed when dealing with local legislative bodies. Its substantive conclusion that the disparities in voting power under the current system are unconstitutionally large may well be correct, but the extent of such disparities, and the possible justifications for them, should not be judged by this inflexible approach.

II. "CONVENIENCE," "PRECEDENT" WHICH NEVER CONSIDERED THE ISSUE, AND THE ALLEGEDLY DIFFERENT ROLES OF AT-LARGE AND DISTRICT- LEGISLATORS, ARE INSUFFICIENT REASONS FOR REJECTING AN ESTABLISHED ANALYTICAL TECHNIQUE, AND ADOPTING AN UNSUITED ONE WHICH DOES NOT MEET THE COURT'S OWN CRITERIA

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[23] Under the holding, any proposed modification which leaves Staten Island with the same number (and voting power) of representatives on the Board as the other boroughs -- regardless of the number of other Board members, how they are elected, and how many votes they may have -- would be unconstitutional, regardless of whatever some other method of analysis designed to deal with such innovative approaches may show, and regardless of any factual showings made by the City.

The Court of Appeals rejected a more sophisticated and established technique for analyzing voting power in favor of the rigid Abate test in part for "convenience," including a "demonstrated impatience with mathematical metaphysics."[24] In this it no doubt was referring to the lower court's uncertainty in dealing with the effects on voting power of the three at-large legislators:

"Evaluating the effect--if any--of at-large representation on inter-district inequality means speculatively assigning those at-large votes among the districts." 592 F. Supp. at 1473 [Emphasis added] "If that step is taken and the limitation thereby ignored, a deviational figure of doubtful validity is received." Ibid, [Emphasis added]

"[A]ny quantitative method for analyzing the Board that attempts to allocate the citywide members' votes among the boroughs is inevitably arbitrary and ad hoc...the most appropriate methodology for analyzing the representation of individual citizens on the Board...is one which treats the two groups of representatives separately [i.e., "excluding the at-large" (fn 15)]" 592 F. Supp. at 1474, quoting with approval from an affidavit.

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[24] 831 F.2d 384, 386.

But in so doing the district court chooses to ignore -- in part because it was not advanced by either party prior to the first district court decision as to methodology,[25] and in part because a brief amicus curiae bringing it to the court's attention was allegedly filed too late[26] -- a method of analysis which is

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[25] For reasons unclear to Prof. Banzhaf, apparently no party brought the Banzhaf Index to the district court's attention prior to its initial decision concerning the test to be employed, although both sides have used the Banzhaf Index in calculating the distribution of voting power within the Board of Estimate, and although a major article on the mathematics of reapportionment as applied to the New York City Board of Estimate discussed it at length. See Charo, Designing Mathematical Models to Describe One-person One-vote Compliance by Unique Governmental Structures; The Case of the New York City Board of Estimate, 53 Fordham L. Rev. 735 (1985).

[26] Prof. Banzhaf's amicus brief was submitted to the district court on or about June 30, 1986; more than five months before the district court rendered its final decision on Nov. 19, 1986, 647 F. Supp. 1463, n. 1 at 1465.

Although courts have the power to refuse to consider amicus briefs which are not timely, here: (1) the delay was not due to any fault of Amicus Banzhaf

not only clearly NOT ad hoc, but which is well-established and based upon principles long accepted in the relevant disciplines.

A. THE BANZHAF INDEX CORRECTLY ANALYZES WEIGHTED VOTING

It has long been generally accepted in the fields of mathematics[27] and political

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(who was previously unaware of the proceeding); (2) the issues were unusually complicated because of the mathematics involved; (3) this amicus, because of his prior researches, was in a unique position to assist the court; and (4) the proceeding (and therefore the court's ruling) affected not just the immediate parties, but every resident of New York City.

For these reasons, and because both the lower courts and the Supreme Court should avoid making decisions on constitutional issues where the record is incomplete, it is respectfully suggested that Judge Neaher should at the very least have taken some testimony on these very complex mathematical issues.

[27] See, e.g., Kemeny, Snell & Thompson, Introduction to Finite Mathematics 74, 108 (1957); Shapley, Solutions of Compound Games, in Advances in Games Theory 267 (Dresher, Shapley & Tucker ed. 1964); Riker, A Test of the Adequacy of the Power Index, 4 Behavioral Science 120-31 (1959); Shapley, Simple Games: An Outline of the Descriptive Theory, 7 Behavioral Science 59 (1962);

science[28] that "voting power" or "voting strength" means nothing more or less than the ability to affect outcomes by and through a vote. The Court of Appeals in New York has determined that voting power, at least in weighted voting systems, is to be determined in this way.[29] In other words, to determine

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Shapley, A Value for 4-Person Games, 2 Annuals of Mathematical Studies 307 (No. 28, 1953).

[28] See, e.g., David, Goldman & Bain, The Politics of National Party Conventions 174-75 (1960); Schubert, Quantitative Analysis of Judicial Behavior, Ch 4 (1959); Schubert, Judicial Behavior (1964); Krisler, Theoretical Attempts at Predicting Judicial Behavior, 79 Harv. L. Rev. 1573 (1966); Krisler, Power and Coalition on a Nine-Man Body, Am. Behavioral Sci. (Apr. 1963); Riker, Some Ambiguities in the Notion of Power, 58 Am. Pol. Sci. Rev. 341 (1964); Riker, Bargaining in a Three-Person Game, a paper delivered at the 1966 Annual Meeting of the American Political Science Association Sept. 6-19, 1966; Schubert, The Power of Organized Minorities in a Small Group, 9 Ad. Science Q., 133 (1964); Shapley & Shubik, A Method for Evaluating the Distribution of Power in a Committee System, 48 Am. Pol. Sci. Rev. (1954).

[29] Iannucci v. Board of Supervisors, 220 N.Y. 2d. 244, 229 N.E. 2d. 195, 282 N.Y.S. 2d 502 (1967).

voting power, one asks how often a person, by and through his vote (and only by and through his vote) can determine outcomes -- (i.e., has the ability to decide the issue) -- a technique which has been used in many other voting situations.[30]

In the case of legislators (i.e., analyzing voting power within legislative bodies), the model is straightforward, since legislators vote for or against various measures, and a count of their vote determines whether or not the measure passes. All of the parties, and the court below, have accepted this--that the Banzhaf Index is the measure of

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[30] See, e.g., Riker & Hiemi, The Stability of Coalitions on Roll Calls in the House of Representatives, 56 Am. Pol. Sci. Rev. 58 (1962); Krisler, The Power Index, Reapportionment and the Principle of One Man, One Vote, 1965 Modern Uses of Law and Logic 37, 40-43; Mann & Shapley, The A Priori Voting Strength of the Electoral College, in Game Theory and Related Approaches to Social Behavior, (Shubik ed. 1964); Mann & Shapley, Values of Large Games IV: Evaluating the Electoral College by Monte Carlo Techniques (RAND Corp. Memo RM-2651, Sept. 19, 1960); Mann & Shapley, Values of Large Games VI: Evaluating the Electoral College Exactly (RAND Corp. Memo RM-3158-PR, May 1962).

voting power of the individual legislators in the Board of Estimate--and have proceeded accordingly.[31]

B. THE BANZHAF INDEX CORRECTLY ANALYZES THE ELECTORAL COLLEGE

In the case of presidential elections, the model is also straightforward, since citizens vote for electors, and electors

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31 The calculations of voting power among the members of the Board of Estimate (which employs weighted voting) were made using the Banzhaf Index of voting power; the number (and percentage) of combinations in which each legislator can cast a critical or deciding vote. However, although two of the parties and a Law Review author -- see, e.g., Intervenor Ponterio's affidavit dated May 2, 1985 at 5-6; Prof. Steven J. Brams' affidavit dated April 9, 1985, for Plaintiffs; and Charo, Designing Mathematical Models to Describe One-person One-vote Compliance by Unique Governmental Structures; The Case of the New York City Board of Estimate, 53 Fordham L. Rev. 735 (1985) -- purport to apply Banzhaf's principles and/or to make a Banzhafian analysis of voting power under the current Board of Estimate, none have in fact done so correctly.

Indeed, Author Charo, in a telephone conversation with Prof. Banzhaf, admitted that her "Banzhafian analysis" was not based upon Banzhaf's methodology, and that the technique of analysis outlined in this document would probably be more appropriate for the Board of Estimate.

cast their vote in accordance with the majority of votes cast in their states.[32] The voting process is now a two-step one, and each step must be calculated separately.

Thus, for example, to calculate the voting power of citizens of different states under the Electoral College, one first calculates in what percentage of the combinations of electoral votes the votes from any one state will be decisive. This is compared with similar calculations for the electoral votes of the other states.

In essence, this step in the electoral college is nothing more or less than a legislative body employing weighted voting to decide one very important issue, and the voting power of the phantom legislators [electors voting in one block from each state] is calculated the same way that the voting power of the members of the Board of Estimate was calculated.

The second step in this two-step process is to now determine in how many

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32 This is true except in the very rare instance of the "faithless elector."

cases a citizen of any one state (e.g., New York) might cast a vote which would be decisive of how the electoral votes in his state would be cast, and to repeat the calculation for all of the other states. Naturally, citizens of the most populous states have less chance of casting a critical vote in their state than do residents of less populous states.[33]

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[33] It is easy to prove that, in situations where each person has one vote, his or her ability to cast a critical or decisive vote doesn't decrease linearly (proportionately) with the number of people voting. Where the number of persons voting is small, one can calculate by hand the total number of voting combinations, and the number (and percentages) in which each person can cast a critical vote ["CRITICAL VOTING COMBINATIONS"].

For example, if only 3 people vote, and each has only one vote, there are 8 possible voting combinations, and each person can cast a critical vote in 4; i.e., in half of the voting combinations. For somewhat larger numbers still capable of being calculated by hand, the results are as follows:

COL. 1 = # OF PERSONS VOTING
COL. 2 = # OF VOTING COMBINATIONS
COL. 3 = CRITICAL VOTING COMBINATIONS
COL. 4 = % IN WHICH CRITICAL; COL3/COL2

Finally, for voters in each state, the

COL 1	COL 2	COL 3	COL 4
3	8	4	4/8=50%
5	32	12	12/32=37%
7	128	40	40/128=31%
9	512	140	140/512=28%
11	2048	504	504/2048=24%
13	8192	1848	1848/8192=23%
15	32768	6864	6864/32768=21%

As shown above, if the number of voters increases from 3 to 9 (a factor of 3), relative voting power doesn't decrease by a factor of 3 (50/3 = 16.7), but rather approximately by the square root of 3 (1.732): i.e., 50/1.732 = 28.9.

Likewise, if the number of voters increases from 3 to 15, relative voting power doesn't decrease by a factor of 5 (50/5 = 10), but rather approximately by the square root of 5 (2.24): i.e., 50/2.24 = 22.

For larger numbers of voters, voting power can be calculated by using the universally-established Stirling's Formula, and is found to decrease according to the square root of the number of persons voting. For a more detailed explanation, including the precise formulas, see Banzhaf, Multi-Member Electoral Districts - Do They Violate the "One Man, One Vote" Principle, 75 Yale L.J. 1309, 1320-24 (1966); Banzhaf, 3.312 Votes, A Mathematical Analysis of the Electoral College, 13 Villanova L. Rev. 303 (1968); and Whitcomb v. Chavis, 403 U.S. 124, 145 n. 23 (1971).

two figures are multiplied[34] to determine the overall chance any voter has to cast a decisive vote in a presidential election. While the figures are obviously very small -- as they are even in common single-member-district reapportionment cases -- they do represent the relative voting power of citizens in different states, and thus may be directly compared.

Moreover, they do take into account in a systematic and logical manner, based upon a clear and well-defined mathematical model, the two major factors which obviously must be considered in analyzing the electoral college [or any legislative body]: the number of votes each state [or legislator] has compared

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34 To see why the figures should be multiplied, consider this very simple example. There is a raffle with only 20 raffle tickets sold. Thus each ticket has a 1/20 chance of winning. Suppose that one of the tickets is held by a group of six students, who agree that they will roll a die to decide which of the six should own the ticket. Thus, the chance of any one student winning that ticket is 1/6. And the overall odds that any student will win the ticket, AND that the ticket will in turn win the raffle, is 1/20 x 1/6 or 1/120.

with the other states [or legislators], and the number of citizens eligible to vote for each state's bloc of electoral votes [or legislator]. Both are obviously important, since -- at least in the Electoral College calculations -- the relatively smaller chances citizens from a large body have of influencing the outcome in their state can be more than made up by the voting strength of their bloc of votes.[35]

As previously noted, such calculations and comparisons have been generally accepted, and are described

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35 Prior to publications of Prof. Banzhaf's analysis, it was generally believed that voters in more populous states (e.g. New York) had less voting power under the Electoral College than voters in less populous states (e.g. Nevada) because Nevada had more electoral votes per citizen than New York. However, Prof. Banzhaf demonstrated that the ability of voters to affect the way a state's electoral votes would be cast did not drop off proportionately to the population, but rather more slowly according to the square root of the population. Thus, although the number of electoral votes per resident of Nevada is greater than the same measure in New York, New Yorker's enjoyed far greater voting power in presidential elections.

here only in the very briefest and simplified form.

To make the well-studied situation of the Electoral College more analogous to the instant case where citizens vote for four different legislators,[36] suppose

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36 It may be argued that LEGISLATORS, unlike presidential ELECTORS, do not have to vote in accordance with the wishes of the majority of their constituents, and that they even may not always know how their constituents would vote on a particular issue. But it seems that the very essence of the reapportionment "one person, one vote" decision assumes that legislators do tend to act in this general fashion, at least some of the time. If they did not, what difference would it make if one representative came from a district 20% (or even 50%!) more populous than another?

If all that mattered was electing smart or fair-minded persons to the legislature, the residents of the MOST populous district would have an advantage since the chances of finding such a superior person increase with the population of the district. Since it is universally agreed, and the basis of all reapportionment decisions, that persons in MORE populous districts have LESS voting power, the underlying assumption must be that legislators tend to respond to the wishes of a majority of their constituents, at least with regard to some important and well-publicized issues. Thus those in more populous

that somehow (legally or otherwise) a citizen called Mr. X were able to vote in the presidential election in both New York and New Jersey. Using the technique above, we have previously calculated the voting power of voters in both New York and New Jersey under the Electoral College by determining in how many voting combinations a citizen of each state could cast a decisive vote. If Mr. X is able to vote in both states, and presumably to have a chance of casting a decisive vote either in New York or in New Jersey, his voting power would simply

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districts have less chance of influencing legislative decisions.

For studies showing that legislators are very substantially influenced by the views of their constituents, see Cruddle & McCrane, The Linkage Between Constituency Attitudes and Congressional Voting Behavior: A Causal Model, 60 Am. Pol. Sci. Rev. 667-70 (1966); Kornberg, Perceptions and Constituency Influence on Legislative Behavior, 19 West. Pol. Q. 285, 291 (1966); Froman, Congressmen and Their Constituencies (1963); Miller & Stokes, Representation in the American Congress (Prentice-Hall, 1968); Wahlke, Eulau, Buchanan & Ferguson, The Legislative System 273-281; Miller & Stokes, Constituency Influence in Congress, 57 Am. Pol. Sci. Rev. 43, 45-46 (1963).

be the sum of the voting power of citizens of New York and of New Jersey. If he votes in four different states in the presidential elections, his overall voting power will be the sum of the voting power of citizens of each of these states.[37]

As a general rule, then, at least where there are large numbers of voters, the voting power of any individual citizen voter is simply the sum of his voting power calculated with respect to legislator A, plus the sum of his voting power with respect to legislator B, and

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[37] Consider the simple example of the raffle with 20 raffle tickets discussed in an earlier footnote. If any given student is eligible to win a raffle from two different groups each consisting of 6 students, then his overall chances of winning the raffle are the sum of his chances with regard to either of the tickets. If one ticket is owned by six students who agree to award it at random to one of their number; another ticket is owned by four students who likewise agree to award it at random to one of their members; and student Y is a member of both groups -- one may still calculate all of the possible combinations; determine in how many he can win with ticket A or ticket B; and calculate his overall chances of winning by ADDING both figures.

so on with regard to each and every legislator for whom he is eligible to vote. This simple methodology, described in very simple and general form in Appendix I, is valid for virtually all plans no matter how complex, and yields the expected results in simple systems such as single-member districts of unequal population.

C. THE BANZHAF INDEX EASILY ANALYZES THE NEW YORK CITY BOARD OF ESTIMATE

Turning now to the New York City Board of Estimate, it is obvious that each resident of New York City has some voting power arising out of his ability to vote in elections for the three at-large members, and that this is the same and therefore equal for all residents. To calculate the voting power each resident has with respect (for example) to the Mayor, one need only take the voting power of the Mayor and divide it by the square root[38] of the voting population of

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[38] The reason for using the square root of the population, rather than the population itself, was previously explained; where large numbers of voters are involved, the ability to cast a decisive or critical vote decreases as

the entire city. The same technique can be used to calculate the voting power each resident has with respect to the other two at-large members of the Board. All are obviously the same, since the populations eligible to vote for each at-large legislator are the same.

It is also obvious that each resident also has some voting power arising out of his ability to vote in elections for his borough president, and that this voting power is LARGEST in the LEAST populous borough. To calculate it for residents of each borough, one need only take the voting power of the borough president (which is equal to that of all other borough presidents, but less than that of any of the three at-large members who

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the square root of the number of voters. However, even assuming for the sake of argument that it decreased according to the population, or to the square, or to the natural logarithm of the population, there would be no excuse for ignoring the voting power attributable to the three at-large members of the Board, as the lower courts did. In any event, no one has come forth with a competing mathematical model, or even a cogent argument, suggesting that the decrease in voting power is NOT proportional to the square root.

each have two votes) and divide it by the square root of the population of the particular borough.

Since each resident has voting power by virtue of being able to help elect four different people, the voting power of citizens in the most populous and least populous boroughs can be calculated and compared as follows:

<u>VOTING POWER OF BROOKLYN VOTER</u> = (Voting Power of Mayor)/(Square Root of City Population) + (Voting Power of Comptroller)/(Square Root of City Population) + (Voting Power of President)/(Square Root of City Population) + (Voting Power of Borough President)/(Square Root of Brooklyn Population).

<u>VOTING POWER OF ST. ISLD VOTER</u> = (Voting Power of Mayor)/(Square Root of City Population) + (Voting Power of Comptroller)/(Square Root of City Population) + (Voting Power of President)/(Square Root of City Population) + (Voting Power of Borough President)/(Square Root of St. Island Population).

Naturally, the voting power of the resident of Staten Island is GREATER than the voting power of the resident of Brooklyn because the population of Staten Island is far LESS than that of Brooklyn. However, the first three terms of the

equations are the same for both voters. Only the last term is different. Amicus respectfully suggests that the lower court erred in refusing to recognize any of the first three terms, and by insisting that the degree of disparity must be calculated solely on the basis of the borough representative, i.e., only by looking at the last term.

D. "CONVENIENCE" DOES NOT JUSTIFY IMPOSING AN ARBITRARY TEST OF VOTING POWER

Thus the courts below are wrong in suggesting that "convenience" requires the application of the unmodified Abate test in order to avoid ad hoc problems of allocation of voting power and multiple self-serving analyses by the parties. On the contrary, as this brief has demonstrated, there already exists a well-recognized, established, and consistent body of mathematical and political science techniques for measuring voting power; ones which were established long prior to the initiation of the instant challenge to the Board, not by partisans representing one side or the other, but rather by totally independent experts in the field. They

can be used easily and objectively to determine the disparities in voting power in virtually any legislative situation.

In essence, the analysis consists of two different parts. If the legislators cast different numbers of votes (as under weighted or fractional voting), a simple computer analysis, using a program readily available to the public,[39] calculates the number of combinations in which each legislator may cast a "critical" or deciding vote, and uses that to calculate his legislative voting power. This is already the law in New York State,[40] and all parties used this technique to analyze voting power among the members of the Board of Estimate.

The second step is to divide the voting power of each legislator by the square root of his constituency to obtain the voting power each voter has by virtue of being able to vote for any single legislator. Then the voting power of a

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[39] See: Simulation of Weighted Voting: The Banzhaf Index, BYTE, March 1984, at 138.

[40] Iannucci v. Board of Supervisors, 220 N.Y. 2d. 244, 229 N.E. 2d. 195, 282 N.Y.S.2d 502 (1967).

citizen in any district or borough can be obtained by simply adding the voting power he has by and with respect to each legislator for which he is entitled to vote. This second step can be done -- as it was in fact done in this proceeding by Prof. Banzhaf -- on a simple hand calculator! The results are impartial and objective, and permit direct comparison of the disparities in voting power under many different kinds of legislative systems.

In any event, mere "convenience" in the application of a test can never justify striking down an electoral system which actually provides substantial equality of representation: e.g., a reconstituted Board of Estimate composed of the five borough presidents, and 25 legislators elected from equally-populous districts.

The courts' convenience, particularly in a federal system, is not a sufficient basis for denying municipal governments the "flexibility" to which they are constitutionally entitled, Abate v. Mundt, 403 U.S. 184, 185 (1971), nor for creating "roadblock[s] in the path of innovation, experiment, and development

among units of local government," Avery v. Midland County, 390 U.S. 474 (1968).

Complex voting systems, such as the Electoral College or New York City's Board of Estimate, naturally may require more complicated techniques of analysis than simply comparing the populations of the boroughs, and the number (and number of votes) of borough representatives, as the Abate test implies. Indeed, the simple-minded approach the courts below adopted can easily lead to absurd results.

For example Charo, author of a scholarly mathematical analysis of the Board of Estimate;[41] Prof. Steven Brams, whose expert mathematical testimony was cited by the lower court;[42] and City Council President Andrew Stein have all proposed different schemes of weighted voting which each claim will very substantially reduce the inequalities in

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[41] Charo, Designing Mathematical Models to Describe One-person One-vote Compliance by Unique Governmental Structures; The Case of the New York City Board of Estimate, 53 Fordham L. Rev. 735, 776 (1985).

[42] 647 F. Supp 1463, 1476-77.

voting power under the current system. The latter plan, as shown below, in addition to very substantially increasing the voting power of the three at-large members, allocates to each borough president a number of weighted votes approximately proportional to the population [POP] of his borough.

Thus, under the unmodified Abate test and the lower courts' analysis, it should comport with the constitutional requirements, and virtually eliminate the disparities in voting power of which the plaintiffs below complained.

BOROUGH	# OF VOTES	POP	POP/VOTE
Brooklyn	11.3	2,230,936	197,428
Queens	9.6	1,891,325	197,013
Manhattan	7.3	1,427,533	195,566
Bronx	6.0	1,169,115	194,853
St. Island	1.8	352,121	195,623
Mayor	35.0		
Comptroller	35.0		
CC President	35.0		

However, as Prof. Brams has noted in a letter dated Oct. 28, 1987 and published in the New York Times, such an allocation of voting power -- although in apparent compliance with the Abate test -- would in fact make no difference whatsoever in the allocation of voting power! As he

correctly demonstrates, although the borough president from Brooklyn has more than six times the number of votes as the borough president from Staten Island--each in proportion to their respective populations -- each borough president has exactly the same voting power!

Thus the voting power disparities of which the plaintiffs below complained -- because the representative from Staten Island had the same voting power as the representative from the other much larger boroughs -- remain totally unchanged. As Prof. Brams correctly explains:[43]

"To obtain a simple majority of 71 of the 141 votes, two citywide officials and any one of the borough presidents could form a winning coalition; or one citywide official and all the borough presidents could form a winning coalition.

In either case, whether a borough president has 1.8 votes, 11.3, or anything in between, makes absolutely no difference in his or her ability to be a member of a winning coalition.

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[43] A copy of his letter is included as APPENDIX II for the convenience of this Court. Although not part of the record, the Court may presumably take judicial notice of the correctness of his conclusions, as they can be verified by a simple pencil-and-paper analysis.

This renders all borough presidents, despite their different weights, equally powerful in forming a winning coalition. Indeed, if the 36 votes were divided by 5 to give them 6.6 votes each, the possible winning coalitions would be exactly the same as under the Stein proposal."

On the other hand, so long as the more-soundly based calculations rested upon the Banzhaf Index can be performed easily and objectively by all involved, and provide results which are far more consistent with accepted principles of voting power and with common sense (unlike those directly above), the Constitution does not empower the courts to straightjacket legislative innovation in the name of mere "convenience"!

E. CASES WHICH NEVER CONSIDERED THE ISSUE DO NOT ESTABLISH PRECEDENT FOR IGNORING THE AT-LARGE LEGISLATORS

The district court below cites a number of cases involving legislative bodies, which also contained members elected at large combined with those elected from districts, and notes that in those decisions, comparisons concerning voting power are made only between and with regard to the legislators elected from districts. This, the Court of Appeals argues, creates precedent for adopting

the unmodified Abate test to measure disparities in voting power in bodies consisting of both at-large and district-members.

But virtually all of these are lower court decisions where the issue never even came up! Indeed, as the district court itself candidly concedes:

"[T]o be sure, in Oliver and Andrews as well as in the cases cited from other jurisdictions, whether to exclude the at-large representation was not an explicit issue," 592 F. Supp. at 1472 [Emphasis added].

Moreover, some of the cited opinions suggest that borough or district residents were treated the same as other at-large members only because they--unlike New York's borough representatives -- actually represented all of the electorate. Thus in Dusch v. Davis, 387 U.S. 112, 115-16 (1967), the Court notes:

"Each of the 11 councilmen is elected by...all of the electors in the city...If a borough's residents on the council represented in fact only the borough...,different conclusion might follow. [Emphasis added]

Similarly, in Fortson v. Dorsey, 379 U.S. 433, 438 (1965), the Supreme Court remarked that:

"Each district's senator must be a resident of that district, but since his tenure depends upon the county-wide electorate he must be vigilant to serve. . .all the people in his county. . .; thus he is the county's and not merely the district's senator." [Emphasis added]

In summary, in all of the cases cited as "precedent" in the courts below, the issue of how to include the effect of legislators elected at large in the calculations of voting power disparities apparently never came up. In part this may have been because it never occurred to the parties or to the court,[44] and in

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[44] There is a remarkable parallel here with the situation in New York State, where court after court had upheld weighted voting systems simply because they found that legislators were permitted to cast a number of votes proportional to the populations of their districts. But despite this "precedent," the New York Court of Appeals did not hesitate to rule that calculations based upon the Banzhaf Index had to be made in considering such plans. Iannucci v. Board of Supervisors, 220 N.Y. 2d. 244, 229 N.E. 2d. 195, 282 N.Y.S.2d 502 (1967).

Even more remarkable, the New York Court of Appeals learned of the Banzhaf Index only after argument in the case was heard when the author filed a brief amicus curiae, and adopted it without any

part because the influence of the at-large members was so small that it did not appear likely to significantly affect the calculations of voting disparities.

As another mathematician-lawyer writing specifically about this case noted:[45]

"[N]one of these cases have presented a situation in which at-large representatives have a majority voting bloc. This is a significant qualitative difference in the organization of the Board's voting structure."

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evidentiary hearing or even argument by counsel. In contrast, the district court here refused to admit the author's brief amicus curiae as to the methodology, or to hold any evidentiary hearings before rejecting it out of hand.

On the basis of this very scarce record, the Court of Appeals affirmed; and the Supreme Court is now asked to rule on an important Constitutional issue which will establish an inflexible standard for all local municipal bodies which admittedly refuses to consider the effect at-large legislators (and, by inference, those elected from single-member districts) obviously have on overall voting power.

[45] Charo, Designing Mathematical Models to Describe One-person One-vote Compliance by Unique Governmental Structures; The Case of the New York City Board of Estimate, 53 Fordham L. Rev. 735, 776 (1985) [emphasis added, footnote omitted].

Unfortunately the Court of Appeals seems to have misunderstood the significance of this difference, saying:

"there is no principled reason . . why different basic theories of equal protection should apply depending on the size of the at-large membership. 831 F.2d 384, 389 [emphasis in original]

But analysis under the Banzhaf "theory" proceeds the same way whether the size and/or voting power of the at-large membership is large or small.

If the voting power of the at-large members is large, its impact on reducing disparities in voting power among voters of different single-member districts will be significant and must be considered, as will be shown using the Banzhaf Index. On the other hand, where the voting power of the at-large members is small, its impact can still be precisely determined by using the Banzhaf Index, but it may be so tiny that it makes no significant difference in the calculation of the disparities, and thus may be ignored.

In other words, the earlier cases cited as "precedent" may have ignored the at-large legislators, not because situations where the at-large members have a small minority of voting power require one

technique of analysis, and situations where the at-large members have a substantial majority of voting power require another, but rather because in the former situation the effects on the disparity calculations are not legally significant.

F. THE Abate TEST NOT ONLY FAILS TO DEAL WITH AT-LARGE LEGISLATORS, BUT ALSO FAILS TO MEET THE COURT'S OWN CRITERIA

The Court of Appeals suggests, as reasons for rejecting the Banzhaf Index in favor of the unmodified Abate test, that the former does not reflect "voter motivation," and ignores factors such as "ingrained partisan preferences," "voting habits," and the "tradition of 'collegiality,'" 831 F.2d 384, 390-91. But these are hardly valid criticisms, and the Abate test has the same -- and many other -- problems.

First, voter motivation has never been considered the test -- or even an appropriate criteria -- in reapportionment cases. In many cases of unequally-populated single-member districts, residents of the LESS populous district may still be LESS motivated to vote than those in the more populated

districts because one party clearly dominates the district, the population and/or their interests are too homogeneous, the legislator is solidly entrenched in office, or for other similar reasons. Yet no such showings would prevent a court from ruling that the residents of the UNDERpopulated district have MORE voting power, and of ordering reapportionment if the disparities exceeded certain levels.

Moreover, if "voter motivation" is an important factor in measuring voting power, we should logically expect that voter turnout in elections for borough president in New York should DECREASE as the population of the borough INCREASES; that since residents of Queens, for example, have far less voting power than residents of Manhattan and the Bronx, voter turnout there should be less.

Yet official figures -- of which this Court may take judicial notice -- for the 1986 populations of the five boroughs, and for the number of voters [TURNOUT] in

the last election,[46] demonstrates that no such simple correlation between voter motivation and voting power exists.[47]

BOROUGH	POPULATION	TURNOUT	% TURNOUT
Brooklyn	2,293,200	268,045	11.69%
Queens	1,923,300	275,300	14.31%
Manhattan	1,478,000	204,927	13.87%
Bronx	1,193,600	139,705	11.70%
St. Islnd	324,600	76,058	23.43%

Perhaps, as the Court of Appeals itself suggests, voter motivation has little to do with voting power: "One votes because he thinks it his duty as a citizen or because he feels social pressure to do so or because he finds a symbol of inclusion

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[46] 1986 Provisional Statistics, U.S. Census Bureau; and New York City Board of Elections, Statement and Returns.

[47] The results are virtually the same when the older population figures-- those used by the lower courts -- are used instead of the more recent census data. Although "voter motivation," as measured by voter turnout, is in fact highest in Staten Island where voting power is greatest, there is no corresponding correlation in the other four boroughs. Thus the higher turnout in Staten Island could have been caused by many factors such as a more charismatic candidate, an important local issue, etc.

in the act,"[48] all motivations which have nothing whatsoever to do with the degree of malapportionment!

Naturally the Banzhaf Index, like the unmodified Abate test, does not take into account "ingrained partisan preferences," "voting habits," the "tradition of 'collegiality,'" or other similar factors in determining voting power, for several very good and sufficient reasons. First, permitting evidence concerning such factors to be introduced into reapportionment cases, and requiring the courts' calculus of voting power disparities to factor them in, would create impossible problems, and push the courts even further into a quagmire.

Second, these matters have a habit of being temporary and transitory, so that a plan upheld in one suit based upon such factors might have to be reconsidered shortly thereafter in subsequent suits.

Finally, the whole purpose of the "one man, one vote" cases is to equalize the "rules of the game" -- i.e., the allocation of voting power inherent in

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[48] 831 F.2d 384, 390, quoting from other authorities.

the rules for voting[49] -- and not the way the voting power is actually used in practice. To attempt to do anything more, and to require any test of voting power disparities to include factors such as "collegiality" and "partisan preferences" as the Court of Appeals suggests, would force the courts to intrude far beyond their limited role of insuring that citizens have approximately

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[49] For example, no one would seriously doubt that in the U.S. Supreme Court all justices have equal voting power, since each can cast one and only one vote. This is true although factors such as an individual justice's seniority or personal persuasiveness, or temporary ideological divisions on the Court, may mean that one justice is more "powerful" in some sense, or able to influence more crucial decisions, than another. Similar factors, of course, may likewise affect the distribution of power in a body where legislators, each casting one vote, come from single-member districts of identical population. No system of allocating voting power among justices (or legislators) could hope to eliminate these differences (even in the short run), any more than this Court should seek to deal with such factors in fashioning the voting rules, or the tests for voting power, for municipal voting bodies.

equal voting power.[50] In any event, since the Abate test likewise does not take into account these various factors, these are not valid arguments for accepting it and rejecting the Banzhaf Index, particularly since the Abate test admittedly cannot and does not take into account the obvious effect of the at-large board members who cast a majority of the total number of votes.

G. THE "DIFFERENT INTERESTS" ARGUMENT DOESN'T JUSTIFY EXCLUDING AT-LARGE LEGISLATORS FROM CALCULATIONS OF VOTING DISPARITY

Finally, the Court of Appeals argues that the at-large members of the Board must be omitted from the analysis of

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50 "These are not right-to-vote cases, even though voting is involved. They are representation cases; i.e., they are cases concerning the most interesting, the most complex, the most baffling aspect of any democratic political system, namely, the ascertainment of public feeling on innumerable public policy issues through the medium of periodic, partisan selection of district delegates to a multimembered representative assembly." Dixon, Reapportionment Perspective: What is Fair Representation, 51 A.B.A.J. 319 (1965), reprinted in Cong. Rec. 10601 (daily ed. May 19, 1965).

disparities in voting power,[51] even though they cast a majority of all of the votes on the Board, because they "represent different interests." The majority cites the issue of a proposed toxic waste dump, where placement in Brooklyn would best serve the interests of most New Yorkers, but where the representative from Brooklyn would likely wish to oppose it.[52]

However, this simplistic example ignores several crucial points. First, the presidents of all of the other boroughs, as well as the three at-large members, are likely to support locating a dump in Brooklyn rather than somewhere else in the city. So, with regard to such local issues as site selection, the roles and interests of the at-large members are likely to be identical to all but one of the borough presidents! The SIMILARITIES of interests and roles, rather than the differences, predominate.

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51 ". .we hold that in calculating voting equality for equal protection purposes the citywide members should be, if not ignored, not considered in the appropriate analysis," 831 F.2d 384, 392.

52 831 F.2d 384, 391-392.

This becomes ever clearer if we imagine a hypothetical new Board of Estimate composed of three at-large members, one representative from Staten Island, and a representatives elected from districts in each of the other four boroughs; each such district roughly equal in population to the population of Staten island. This is a Board which undoubtedly would satisfy the demands of the plaintiffs below, and meet the Abate test.

Yet here also it can reasonably be expected that, while the representative from the district including the proposed dump site will oppose it, most or all of the other representatives from other districts in Brooklyn, like the representatives from the other boroughs and the at-large members, will vote FOR it. In other words, the interests of all but one of the district representatives will coincide with the interests of the city-wide members. There is thus no justification for treating them separately or differently -- or indeed,

for totally overlooking them -- in the voting power calculations.[53]

The crucial question must be whether, with regard to site location and other issues, the residents of Staten Island

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[53] As another simple illustration, consider a hypothetical Board of Estimate like the existing one, but where the three members casting two votes are not elected at large, but rather are elected from three equally populous districts into which the entire city have been divided. Here the interests of the three are clearly regional rather than citywide -- i.e., more like the borough presidents than the three current members elected at large --yet the unmodified Abate test would still ignore their effect upon voting power.

Similarly, consider a hypothetical Board made up of five borough presidents each casting one vote, and six legislators elected from equal-size districts, and each casting one vote. Here the interests of the six district members would be at least as "regional" or narrow as those of the five borough presidents, yet the unmodified Abate test would seemingly still ignore their effect on overall voting power disparities.

Indeed, even doubling their voting power, so that the six regional members together have 12 out of a total of 17 votes, or tripling their voting power, so that the borough presidents have only 5 votes out of a total of 23, would not under the lower courts' analysis decrease the disparities in voting power by one iota!

have an UNCONSTITUTIONALLY greater (not simply greater) say in where the dump will be located. No one doubts that their say is greater than that of residents of other boroughs, since their borough president is responsible to a smaller constituency than the presidents of other boroughs. However, since the Constitution does not require that voting power be exactly equal, and since this Court has repeatedly said that the flexibility municipalities are entitled to under our Federal system may result in some inequalities in voting power, the question in cases such as this is whether the inequalities are within the limits the constitution permits.

The answer lies not in overlooking the overall effect of some members of the Board, and pretending that the interests of the other borough presidents are so different that their 6 out of 11 votes must be ignored. Rather it lies in calculating with precision the chance residents of Brooklyn have to influence crucial legislative decisions -- which may include the location of toxic dumps-- compared with the chances residents of

Staten Island have in affecting those same decisions.

III. THE COURT'S DETERMINATION IN WHITCOMB V. CHAVIS WAS NOT THAT THE BANZHAF INDEX WAS INAPPROPRIATE IN DETERMINING VOTING POWER DISPARITIES, BUT RATHER THAT NO SINGLE MATHEMATICAL ANALYSIS -- BY ITSELF -- SHOULD OVERCOME THE PRESUMPTION OF CONSTITUTIONALITY OF A MUNICIPAL VOTING SYSTEM, AND THE FLEXIBILITY TO WHICH LOCAL GOVERNMENTS ARE ENTITLED UNDER OUR FEDERAL SYSTEM.

In the companion cases of Whitcomb v. Chavis, 403 U.S. 124, and Abate v. Mundt, 403 U.S. 182, both decided June 7, 1981, the Court faced two different "one man, one vote" challenges to non-federal legislative systems. In Abate this Court upheld the plan despite admitted inequalities in voting power, stressing the value of "close cooperation between the county and its constituent towns," id. at 186, "the advantages of having the same individual occupy the governing positions of both the county and its towns," ibid., and reaffirming that "viable local governments may need considerable flexibility in municipal arrangements if they are to meet changing societal needs," id. at 185 [emphasis added].

All of these arguments appear to apply as well to the instant situation. Moreover, there was no hint in the Abate opinion that the test the Court utilized to uphold the plan, a plan which involved only legislators elected from individual districts and NOT at large, should be used in situations involving a mixture of legislators elected at-large and from separate districts.

In Whitcomb the Court faced several challenges to multi-member districts, including one based upon the Banzhaf Index. This Court did not question the mathematical analysis,[54] but concluded

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54 "The District Court did not quarrel with plaintiffs' mathematics, nor do we," Id. at 145; "The only relevant difference between the elementary arithmetic on which the Court relies, and the elementary probability theory on which Professor Banzhaf relies, is that calculations in the latter field cannot be done on one's fingers," Id. at 168, n. 2 (Opinion of Harlan, J.).

Justice Harlan is incorrect, however, when he says that the Banzhaf technique ASSUMES that the probability of voting for candidate A over candidate B is 50%, or that the calculation of voting power is affected by varying this assumption, Id. at 169. The Banzhaf Index postulates only that, a priori, all voting combinations are equally significant (NOT

that a mathematical test, by itself, and without sufficient additional factual support in the record,[55] was insufficient not only to overcome plaintiffs' heavy burden, but also to overturn a line of precedent where the issue of the alleged unconstitutionality of multi-member

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equally likely).

In other words, when formulating a voting body by assigning the number of votes each legislator is to have, and the size of the district (or at-large) from which he is to be elected, it is impossible to predict that any particular voting combination is more likely to come up, or that it will come up with regard to more important issues. Thus, in fairness, all possible results or outcomes must be considered equally significant, and given equal weight.

55 "The real-life impact of multi-member districts on individual voting power has not been sufficiently demonstrated, at least on this record, to warrant departure from prior cases." Id. at 146. "The theory that plural representation itself unduly enhances a district's power and the influence of its voters remains to be demonstrated in practice and in the day-to-day operation of the legislature. Neither the findings of the trial court, not the record before us, sustains it, even where bloc voting is posited." Id. at 147. [emphasis added]

districts had been "squarely presented" but rejected by the High Court.[56]

Here is situation is very different. In Whitcomb the plaintiffs, solely on the basis of a mathematical theory, asked the Court to strike down a line of precedent where the issue had been "squarely presented"; and to render a decision which would have impacted the overwhelming majority of state legislatures[57] and outlawed a system which had been in effect since colonial times.[58]

In the instant proceeding, the question of measuring disparities in voting power in a mixed system of at-large and district- legislators has apparently never been directly addressed by any court, much less "squarely presented" to

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56 "Subsequently, when the validity of the multi-member district, as such was squarely presented, we held that such a district is not per se illegal under the Equal Protection Clause." Id at 142. [citations omitted].

57 "As of November 1970, 46% of the upper houses and 62% of the lower houses in the States contained some multi-member districts," Id. at 157, n. 37.

58 Id. at 158.

the Supreme Court. Plaintiffs below, brandishing nothing more than their own mathematical test -- which admittedly was not fashioned by this Court for this type of situation; does not meet the Court of Appeal's own criteria; and totally ignores the effect of the at-large Board members -- seek to overcome the presumption of constitutionality, and a technique of analysis which is firmly grounded in the relevant disciplines, without any hearing or evidentiary record.

More precisely, it appears that Plaintiffs have produced no evidence to support their mathematical theory that the majority of the Board's voting power held by the at-large members doesn't decrease the disparities. It has also been shown that "voter motivation," a major empirical factor discussed by the Court of Appeals, contradicts their allegations of major disparities; that several weighted voting plans which seemingly follow the Abate formula would -- as Plaintiffs' own expert admits -- be no better than the current system; and that adoption of this test would very significantly and unnecessarily limit the

ability of local governments to provide a flexible response to local conditions and problems.

As this Court well knows, a statistical or mathematical analysis is usually never completely right nor completely wrong. Rather, the weight it is to be accorded depends on how consistent it is with other accepted principles; the extent to which it is or can be supported by empirical evidence; how closely its assumptions or postulates correlate with the reality it purports to measure, etc.

In other words, a court may well find the weight of a particular study insufficient to overcome a strong constitutional presumption and a well-established line of cases, and yet find it sufficiently persuasive to serve as a defense to a constitutional challenge. For example, although this Court found a study of racial bias insufficient -- by itself, and without additional empirical evidence -- to support a constitutional challenge to the administration of the death penalty in McCleskey v. Kepk, 107 S.Ct. 1756 (1987), it undoubtedly would have given significant weight in a case

alleging racial bias to such a study if its results were to the contrary.

Here the same principle applies. Whitcomb provides no support for refusing to even consider -- and to hold a brief hearing concerning -- a major study which is being used to DEFEND rather than attack a municipal voting system, particularly when plaintiffs offer nothing other than their mathematical test which not only likewise lacks empirical foundation, but totally ignores the effect of at-large members, and seemingly validates weighted voting "solutions" which their own expert admits would leave the situation completely unchanged. HOW CAN SUCH A TEST BE ADOPTED AS THE LAW OF THE LAND, GOVERNING ALL MUNICIPAL BODIES?[59]

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[59] Obviously, no mathematical test or technique of analysis can encompass all real-world factors and considerations. However, at a minimum, courts should require that any test for determining differences in voting power incorporate and make use of all of the fixed "rules of the game" -- including, at a minimum, the number of votes each legislator may cast, and the size of his constituency -- and produce results which do not contradict common sense and everyday experience. The Banzhaf Index

CONCLUSION

Here the lower courts, relying solely upon figures produced using the Abate test, have determined that the disparities in voting power are unconstitutionally large, and cannot be justified by the factors cited by defendants below. An affirmance would not only require the Board to reapportion itself, but would also preclude New York City and countless other municipalities from using at-large members, flotorial district members, additional members elected from equal-size districts, and similar techniques to remedy the inequalities and still meet local needs.

Believing that the Abate test is illogical and unduly restrictive, and that a finding of unconstitutionality resting solely on it is insufficient to require reapportionment, Amicus respectfully urges this Court to remand, and to order the district court either to consider alternative analyses of voting

---

meets those criteria, and the Abate test manifestly does not. It should not provide the sole and only support for invalidating NYC's Board of Estimate!

power using the Banzhaf Index, or to hold a hearing on its possible application.

In the alternative, since an analysis of the Board of Estimate using the Banzhaf Index appears in the record,[60] and is supported by defendants below, this Court may well find that the disparities in voting power are unconstitutionally large under either form of analysis. In such a case, Amicus respectfully urges the Court to affirm the finding of unconstitutionality, but to require the district court upon remand to consider plans which do not necessary meet the Abate test if there is other evidence that the plans reduce the disparities in voting power to acceptable limits.

Respectfully submitted,*

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* Consent of the parties to the filing of this amicus brief [Rule 36.2], and the certificate of service upon them [Rule 28.5], have been filed with the Clerk.

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60 See note 3, 831 F.2d 384, 386-87; REPRINTED, APPENDIX III.

APPENDIX I

BANZHAF VOTING POWER INDEX PROCEDURE FOR DETERMINING THE RELATIVE VOTING POWER OF INDIVIDUAL CITIZEN-VOTERS CONCERNING ANY LEGISLATIVE BODY

1. First, determine the relative voting strength of each member of the legislative body, i.e., the legislators. [For the sake of clarity only, this document will use the words "voting strength" to refer to legislators, and "voting power" to refer to citizen-voters. In each case the term refers to the ability of each (legislators or citizens) to affect outcomes through their votes.]

2. If each legislator has one vote, the relative voting strength of each legislator is one. If, however, the legislators have different numbers of votes (i.e., under a system of weighted voting), the relative voting strength of each legislator can be found only by determining the total number of different combinations of legislative votes which are possible, and then determining the percentage of such combinations in which each individual legislator could change the outcome by changing his vote. This usually requires computer calculations.

3. Second, with regard to each legislator, determine the number of people [citizen-voters] eligible to vote for that person. For a legislator who is elected at large, this number would be the total number of eligible voters. For legislators elected from districts, it would be the number of eligible voters in the district. For legislators elected

from boroughs, it would be the number of eligible voters in the borough electing the legislator.

4. Next, with regard to each legislator, divide the legislator's relative voting strength by the square root of the number of people eligible to vote for him. The result is the voting power of the citizen-voter with regard to each legislator for whom he is eligible to vote; i.e., "citizen voting power per legislator," or cvp/l.

5. Finally, to obtain the overall relative voting power of any individual citizen-voter -- i.e., the ability of any given citizen-voter to affect outcomes through his votes for all of the legislators he is able to vote for -- add (take the sum of) the cvp/l for each of the legislators for whom the citizen is eligible to vote.

6. For example, the relative voting power [RVP] of a citizen of any borough on the Board of Estimate as it is currently constituted would be calculated as follows:

cvp/l [Mayor] + cvp/l [Comp.] + cvp/l [Pres.] + cvp/l [bor. rep] = RVP

The first three terms -- the ability of each citizen-voter to affect outcomes by voting for the Mayor, the Comptroller, and the President of the City Counsel-- are obviously the same for all residents of New York City. The last term, however, will be different for each borough, and will be highest for Staten Island because the square root of the number of eligible voters in Staten

Island is far smaller than the square root of the number of eligible voters in the other boroughs.

7. As a further example, assume that there were to be added to the current membership of the Board of Estimate six [or any other number of] representatives each elected from districts within the city of equal population. Then the relative voting power [RVP] of each citizen-voter would be calculated as follows:

cvp/l [Mayor] + cvp/l [Comp.] + cvp/l [Pres.] + cvp/l [dist. rep] + cvp/l [bor. rep] = RVP

Here the first four terms would be equal, and the difference in the relative voting power of individual citizen-voters would lie only in the last term. This, in turn, could be made as small as possible (or necessary) either by increasing the number of votes of members of the Board other than the Borough representatives, or by increasing the number of members elected from districts of equal population.

8. It should be noted that the same technique can also be used to calculate the difference in citizen-voting power in conventional or simple reapportionment cases. Thus, in situations in which legislators each casting one vote are elected from districts of different sizes, the relative voting power of citizen voters in each district is equal to 1 divided by [the inverse of] the square root of the number of eligible voters in the district. In this ways the disparities in voting power between

individual citizen-voters in plans which have received (or been denied) judicial approval can be compared directly with the disparities in voting power between individual citizen-voters under the current or proposed Board of Estimate voting systems.

Banzhaf, Weighted Voting Doesn't Work: A Mathematical Analysis, 19 Rutgers L. Rev. 317 (1965)

Banzhaf, 3.312 Votes, A Mathematical Analysis of the Electoral College, 13 Villanova L. Rev. 303 (1968)

Banzhaf, Multi-Member Electoral Districts--Do They Violate the "One Man, One Vote" Principle?, 75 Yale L. J. 1309 (1966)

Banzhaf, One Man, ? Votes: Mathematical Analysis of Voting Power and Effective Representation, 36 Geo. W. L. Rev. 808 (1968)

Why Stein Plan for Board of Estimate Is Flawed

To the Editor:

The weighted-voting proposal for a new Board of Estimate by City Council President Andrew J. Stein (news story, Oct. 28) makes a mockery of the one-person, one-vote principle that it purportedly satisfies.

Under the proposal, each of the three citywide officials would have 35 votes, and the five borough presidents would have a total of 36 votes (from 1.8 votes for Staten Island to 11.3 votes for Brooklyn).

To obtain a simple majority of 71 of the 141 votes, two citywide officials and *any one* of the borough presidents could form a winning coalition; or one citywide official and *all* the borough presidents could form a winning coalition.

In either case, whether a borough president has 1.8 votes, 11.3, or anything in between, makes absolutely no difference in his or her ability to be a member of a winning coalition.

This renders all borough presidents, despite their different weights, equally powerful in forming a winning coalition. Indeed, if the 36 votes were divided by 5 to give them 6.6 votes each, the possible winning coalitions would be exactly the same as under the Stein proposal.

As an expert witness for the New York Civil Liberties Union in the Board of Estimate case, I proposed a set of weights that translate into voting power commensurate with the borough populations.

There are other means to satisfy the one-person, one-vote requirements that the Charter Revision Commission should consider. But if weighted voting is ultimately adopted, the weights — unlike those in the Stein proposal — should give the borough presidents voting power that reflects the different populations of their boroughs.

STEVEN J. BRAMS
Professor of Politics, New York Univ.
New York, Oct. 28, 1987

The New York Times Company
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APPENDIX III: BANZHAF ANALYSIS

CALCULATION OF DEVIATIONS IN CITIZEN VOTING POWER IN THE PRESENT NEW YORK CITY BOARD OF ESTIMATES [*sic*]

A. *Member, and Population Represented*	B. *Number Of Votes On Board*	C. *Member's Voting Power On Board*	D. *Citizen's Voting Power Thru 1 Member*	E. *Citizen's Total Voting Power*	F. *Percent Deviation Column E*
BROOKLYN 2,230,936	1	8.7	.00582	.0271	-5.15%
QUEENS 1,891,325	1	8.7	.00632	.0276	-3.37%
MANHATTAN 1,427,533	1	8.7	.00728	.0285	-0.25%
BRONX 1,169,115	1	8.7	.00805	.0293	+2.53%
STATEN I. 352,121	1	8.7	.01467	.0359	+25.65%
MAYOR 7,071,030	2	18.84	.00709	The total of these three figures, .021256, is added [to] the figures in Column D to calculate Colum E.	
COMP[TROLLER] 7,071,030	2	18.84	.00709		
COUN[CIL] PRES. 7,071,030	2	18.84	.00709		
AVERAGE DIST. 1,414,206	1	8.7	.00731	.02857	00

C.—Numbers in Column C are calculated using the Banzhaf voting power index.

D.—Numbers in Column D are calculated by dividing the figure in Column C by the square root of the population represented by each member, since the ability of a citizen voter to affect outcomes varies as the inverse [of] (1 divided by) the square root of the population.

E.—Numbers in Column E are calculated by adding to the figure in Column D for each borough representative, the voting power the citizen of the borough has through the three citywide representatives [3 × .00709 = .021256, excluding rounding error].

F.—Numbers in Column F are calculated by comparing the numbers in Column E with the corresponding figures for that of one of the average districts which would be formed if the non-citywide members were each elected from districts with equal population.

Supreme Court, U.S.
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Nos. 87-1022, 87-1112

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, Individually and as Mayor of the City of New York, et al.,

Appellants,

—v.—

BEVERLY MORRIS, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR ABRAHAM D. BEAME and PERCY E. SUTTON, AMICI CURIAE, IN SUPPORT OF MUNICIPAL APPELLANTS

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BRIEF FOR ABRAHAM D. BEAME and PERCY E. SUTTON, AMICI CURIAE, IN SUPPORT OF MUNICIPAL APPELLANTS*

Statement of Interest

Amici Abraham D. Beame and Percy E. Sutton have devoted much of their lives to promoting the effective governance of our Nation's largest metropolis. Mr. Beame has served at the highest levels of government in the City of New York: as Mayor (1974-1977), Comptroller (1962-1965, 1970-1973) and Budget

* Appellants and Appellees have consented to the filing of this brief. Their letters of consent are filed with the Clerk of the Court.

Director (1952-1961). For twelve years he served as one of the three Citywide officials on the Board of Estimate. While active in numerous political and community groups in the City, Mr. Beame is currently a financial consultant to a major bank in New York City.

Mr. Sutton's history is equally impressive: He served as Manhattan Borough President for over a decade (1967-1978) and, as such, as a member of the Board of Estimate; he also served as a New York State Assemblyman (1964-1967). He has held leadership positions in numerous public service, community and business organizations in the City and is currently Chairman of the Inner City Broadcasting Corp., which owns numerous New York City-based communications companies, as well as the world renowned Apollo Theater in New York City's Harlem.

As former members of the Board of Estimate—and as longtime government, community and business leaders in the City of New York—few individuals better understand the nature and importance of the Board of Estimate than amici; few better understand why this eighty-seven year old institution is vital to the delicate balance of regional and local interests essential to the effective democratic governance of New York City. As former government officials—and as businessmen with investments tied to the confidence and stability of New York City's local government—amici have deep professional, financial and personal interests in the efficient operation of New York City's local government. As supporters of the Board of Estimate, they have an interest in ensuring that this pioneer of democratic regional government is not destroyed in the name of democracy.

Amici submit this brief to clarify what should be the central focus of this case: the overriding governmental interests served by the Board of Estimate for almost a century which, together

with its at-large majority composition, validate its constitutionality whatever method of measurement is selected to analyze its structure. The validity of the Board of Estimate turns not on how the arithmetic underlying the Board's structure is manipulated, but rather on the legitimate government purposes the Board serves. We address this brief solely to that issue.[1]

Argument

THE BOARD OF ESTIMATE EMBODIES A RATIONAL PLAN FOR REGIONAL GOVERNMENT THAT PROMOTES LEGITIMATE PUBLIC POLICIES AND JUSTIFIES POPULATION DEVIATIONS NECESSARY TO ACCOMPLISH ITS PURPOSES

In the Courts below, this case proceeded on the assumption that the central issue was one of arithmetic. If a method of measurement produced a deviation of 133%, the Board was bad. If it produced a deviation of 16%, the Board was good. If a method of measurement could be found to reduce Appellees' 133% deviation to the Municipal Appellants' 31%, then perhaps the Courts would find the numbers palatable and give their blessing. So heavily did the case focus on numbers that the Second Circuit opinion dealt almost exclusively with the arithmetic issues.

While we agree with Appellants that the 133% deviation found by the Courts below is grossly exaggerated because of their disregard of the at-large members, we believe that the heart of the Appellants' case is neither arithmetic nor the validity or invalidity of the Banzhaf formula. The heart of the case is found in the underlying governmental policies animating the Board and in its ingenious structure which precludes minority control, balances regional and local perspectives and does not, in the real world, favor any group of New Yorkers over others. In our federal system, these state policies and institutions are entitled to "substantial deference" from the federal govern-

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1 Amici incorporate the statement of the case as set forth in the Brief for the Municipal Appellants.

ment. *See, e.g., Brown v. Thomson*, 462 U.S. 835, 847-48 (1983). Because of these policies, the Board's electoral design, we submit, satisfies the equal protection clause. The arithmetic issues are secondary at best.

We turn to an examination of these state policies.

1. *Promoting Regionalism*: The New York Constitution says that "[e]ffective local self-government and intergovernmental cooperation are purposes of the people of the state." N.Y.S. Const. art. IX, § 1. New York State has an especially strong interest in its policy of exercising certain of its most localized police powers through a regional governing entity comprised of elected officials. (JA394, 443-444.)[2] In determining the Board's makeup, the State was entitled to take account of the political exigencies of forming and operating such a regional government for New York City.

Ordering priorities and policies between the competing—and equally legitimate—claims of local and regional interests in land and government resources is the central problem in the management of this country's largest metropolitan area. (JA409-425.) "Throughout the city's history," as appellees' expert notes, "the Board of Estimate has been the principal body where this conflict, and, most significantly, the resolution of this conflict, has been deliberately institutionalized." (JA73.) After nearly a century, "[t]he conflict between City-wide and local priorities, which necessitated the creation of the Board of Estimate, still exists." (*Id.*)

The need for regional institutions of this type is manifest: The efficient deployment of resources and the orderly development of land compel cooperative ventures in service of the gen-

2 "JA___" refers to pages in the Joint Appendix to the Municipal Appellants' Brief. "JS___" refers to pages in the appendix to the Municipal Appellants' Jurisdictional Statement.

eral welfare.[3] The interdependence of activities within a metropolitan area require area-wide institutions to perform certain government functions. (*See, e.g.*, JA447-449.) Yet a basic political reality confronts a state in shaping such substate units to address regional needs: No tradition is more firmly implanted on our body politic than that of home rule (N.Y. Municipal Home Rule Law art. 2, § 10(13) (McKinney Supp. 1988; *see also* JA443); de Tocqueville long ago wrote that "in the United States municipal liberty derives straight from the dogma of the sovereignty of the people" A. de Tocqueville, *Democracy in America* 67 (G. Lawrences trans. 1969). People want some control over their own affairs; they demand a say on matters closest to home; they insist on the right to participate in decisions that will affect their community. (JA411, 435, 449, 456.) And nothing so sharply engages this interest as decisions on the use of land and government property.

The tension between the need for regional governing entities and traditions of local independence etches in sharp relief the policies the Board of Estimate embodies. (JA73.) The policy of New York State—and of every state—is to delegate police powers over land, government property, and contracts for basic government services to the smallest political subdivisions within the State. This policy expresses a decision that people should have a meaningful voice, through elected officials at the most local level, in decisions that most directly affect their communi-

3 Some of these may extend to more than one state. A well-known example is the Port Authority of New York and New Jersey, which is a bi-state agency of the States of New York and New Jersey. It exercises dominion over a vast enterprise with a vast budget and exercises wide governmental powers. It is governed by a Board composed of an equal number of representatives appointed by each of the states. If New York and New Jersey were to decide that the Port Authority should be governed by a Board composed of the three highest elected officials in each State—the governor, the comptroller and the attorney general—then if the Second Circuit correctly reads the Equal Protection Clause, such an arrangement would be invalid because New York's representatives would not have 2.3 times the votes of the New Jersey representatives. To accommodate such a requirement would make an effort to democratize the Port Authority absurd—and would most likely destroy it altogether.

ties. The peculiar needs of New York City—the need to bring a controlling City-wide perspective to competing local demands—required some accommodation of that policy to address regional problems. (JA592.) The State reasonably concluded that providing an equal vote to borough presidents was essential to obtain a consensus on the transfer of local powers to a central authority, and to allow that body in turn to achieve consensus on the proper ordering of City-wide priorities.

The State was entitled reasonably so to conclude. It is not beyond the legitimate considerations of a state, in seeking to formulate regional responses to social problems, to take account of the reluctance of small communities to tolerate the unchecked exercise of local powers by a central authority. It is not outside the broad realm of permissible State decisionmaking to provide some institutional assurance that smaller components of a regional federation will not become the sites for the most noisome of regional activities such as garbage disposal plants and prisons. It is not beyond reason for the State to conclude that equal votes for borough presidents will tend to create a cohesive local bloc to defend local interests against a centralist viewpoint. It is not irrational for a State to determine that the benefits of pooling resources—of bringing together Manhattan's huge tax base, Staten Island's large tracts of undeveloped land, the manufacturing and port facilities of Brooklyn, the bedroom communities of Queens and the Bronx—required some political adjustments to induce the people of each community to join and work in harmony. (*See, e.g.*, JA435, 449, 456.) It is within the power of a State to determine that a combination of majority rule with an equal vote for existing local officials representing the borough is an acceptable accommodation to achieve the support necessary for the formation and successful operation of a regional body. Reasoned compromise, such as that between regionalism and localism reflected in the Board's structure, has its place in the Constitution.[4]

4 *See* Leventhal, *Courts and Political Thickets*, 77 Colum. L. Rev. 345, 351 (1977) (Judge Leventhal opposed "rigidity" in approaches to regional governments which would discourage "[w]ealthier suburbs" from joining "the needy and densely populated cities in metropolitan councils"); Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. Penn. L. Rev. 261, 305 (1987) ("[M]unicipal government pursuing locally chosen policies within a state-determined framework needs greater flexibility to prevent the local preferences of other municipalities from narrowing its own range of choices").

The contrary result below threatens more than the dismantling of New York City's oldest government institution. The need of the future is for more, not less, regional government; for more, not less, cooperation among villages, towns, cities, counties, and states; for more, not less, recognition of the interdependence of disparate political communities in the use of local land and resources—precisely the matters over which the Board exerts jurisdiction. The enormity of political opposition to regionalism, stemming from understandable fears that a remote central authority will ignore local interests, compels compromise for this need to be met. (JA435, 449, 456.) An overly rigid application of the one-person, one-vote principle, blind to the realities of how such regional bodies come into being and how they operate, can only frustrate State efforts to balance centralization with local autonomy, majority authority with minority representation, and relative efficiency with participatory and responsive government. Nothing in the Constitution compels that result.

2. *Assuring Meaningful Representation*: Appellees conceded below that assuring "[m]eaningful participation by the citizens of the lesser populated boroughs" is a valid state interest. (JA394.) In designing the Board's electoral design, the State properly considered the need to assure meaningful representation of all segments of the population.

The record here is overwhelming—no contrary evidence exists—that recomposing the Board according to strict population would reduce the citizens of Staten Island (and, of necessity, the Bronx as well) to the status of bystanders in the Board's deliberations. (JA404-499.) Not only did appellees' own expert so opine (JA167), but so, too, did every other expert

with experience in City government. (JA424, 444-445, 463, 510-511.) This consensus establishes that were the Board based solely on population of the boroughs, the presidents of Staten Island and the Bronx (and, to a lesser extent, Manhattan) would not be able to affect the outcome of decisions the Board makes; the presidents of Brooklyn and Queens could determine every decision.[5]

The State of New York was entitled reasonably to conclude that citizens of smaller boroughs should receive a meaningful voice in the Board's deliberations and that equal votes for all borough presidents, combined with majority rule, was necessary to have those voices heard. (JA420-425.) A decision to place a landfill on Staten Island may facilitate sanitation in Brooklyn, just as a decision to shelter the homeless in the Bronx may relieve Queens of the need to do so. Yet the residents of those larger communities should enjoy no privilege to shift their obligations to distant places—and certainly not without the opportunity of the residents who will be bearing the impact of those obligations to participate meaningfully in the decision to accept them. Fair and effective representation presupposes that a representative will have some ability to affect decisions. It is within the reasonable discretion of New York to decide that an equal vote on the Board is essential to obtain such representation.

Brown v. *Thomson*, 462 U.S. 835 (1983), so confirms. There, Wyoming apportioned one of the seats in its state legislature to

5 Appellees apparently now agree. While arguing in the courts below that the Board's current system is invalid precisely because an alternative weighted voting system exists, they have elsewhere suggested that adoption of any such readjusted weighted voting system would violate the Voting Rights Act of 1965, §§ 2 and 5, 42 U.S.C. §§ 1973 and 1973c. *See* Purnick, *Board of Estimate in Conflict: The Final Phases*, N.Y. Times, Feb. 21, 1988, at 34, col. 1. Their theory is that such a readjustment would substantially dilute the voting power of the presidents of the two boroughs (Manhattan and the Bronx) that have historically elected members of minority groups to the Board. The current Manhattan Borough President is black; the current Bronx Borough President is Hispanic. Their constituency is broader than the geographic units they represent.

a county the population of which was (as Staten Island's is) less than half the population of a perfectly apportioned district. The county had had its own representativ in the legislature since 1913 (or twelve years *after* Staten Island first placed a borough president on the Board of Estimate). Counties also had historically served as units of local government (in much the way boroughs served in New York). The State decided that providing the county with a legislative seat was the only way to assure the people of that county a meaningful representative. In upholding the State's decision, the Court instructed that, in weighing the avowed interests purporting to justify a government plan, "substantial deference is to be accorded the political decisions of the people of a State acting through their elected representatives." 462 U.S. at 847-48. New York merits that deference here.

3. *Balancing the Disparate Impact of Local Decisions*: The State has a rational interest in giving its citizens a say in the use of government powers that affect them closest to home. The State was entitled to consider the disparate impact of the Board's highly local powers in designing the Board.

The State of New York could reasonably conclude that the Board's powers affect people in uneven ways precisely owing to their residence in a particular borough. (JA142-143, 428, 446.) The Board's exclusive powers over land use, City property (once borough property), municipal service contracts, and franchises are the most local of all police powers. The people of the less populous boroughs—particularly the Bronx and Staten Island, each with large tracts of undeveloped and a disproportionate inventory of City land—have a compelling interest in having an equal say in the exercise of those powers. The borough boundaries thus have meaning that extend well beyond the convenience of using lines that are already there. Respecting the borough boundaries is of vital importance in preserving some voting power over government action that affects people in special ways because of where those people live. (JA421-425.)

So the State could reasonably conclude. The State placed the Staten Island Borough President on the Board of Estimate not

because Staten Island is a convenient way to form a district but because, among other reasons, the land and people of Staten Island are controlled by a central authority whose decisions about that land peculiarly affect them (JA446, 511-518). It may be that a State is not free to recognize residence as a distinctive voter interest in drawing lines for a government exercising general powers. But when a governing body possesses limited powers that vitally and directly affect the use of land and property, some careful and limited consideration of residence in the composition of that body is not irrational, especially when the State tempers its consideration with assurance of control by an unclassified majority of voters. *Cf. Town of Lockport* v. *Citizens for Community Action at the Local Level, Inc.*, 430 U.S. 259, 266 (1977) (rational for a state to consider whether government action has "a disproportionate impact on an identifiable group of voters"); *see also Salyer Land Co.* v. *Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 728 (1973) (precisely narrow functions of a governing body may remove it from the reach of "one person, one vote").

4. *Assuring an Effective and Consensual Discharge of Government Powers*: The State has an obvious interest in fostering consensus in local decisionmaking and may reasonably consider the best means to achieve that end. Here, the Board's success has its claims to validity, and the courts below so held: The district court expressly found, and the court of appeals did not dispute, that the Board of Estimate has been an effective and efficient governmental institution in New York City well suited to its limited purpose. (JS87-90.) This finding cannot be divorced from the three policies that are key ingredients of the Board's proficiency.

The first is a policy on the size of the institution to handle the Board's specific duties. (JA74, 418.) Land-use decisions, government contracting, and the other of the Board's administrative duties are unsuitable subjects for large assemblies to consider. No governing body in New York State (or, to our knowledge, elsewhere) boasts a legislature-size membership entrusted with such decisions. A body of any greater size than the current Board would diminish if not eliminate the Board's abil-

ity to form consensus, make deliberative judgments, and act decisively—and usually unanimously (JA94.) According to appellees' principal expert, "[t]his organic need for a small, elected body responsible for setting policy on matters relating to the city and its people has always been reflected in past charter revisions" (JA163), with the result that the Board's size has not changed since 1901.

The second policy relates to the membership of the governing body. (JA417-424.) Throughout the State, and throughout the history of New York City, land-use, government property, government contracting, and budget formation have been assigned to the highest elected officials of a community. The Board's composition reflects a judgment to limit its membership to persons who are elected to office in their own right as executives of existing political units (the City and its boroughs). That each member—borough presidents as well as City-wide officials—performs duties wholly apart from Board membership is an important element in the Board's central role of balancing regional concerns with local needs. Thus, as appellees' expert put it, "[t]he members of the Board, each publicly elected, each with a broad and diversified constituency, and each in an executive position, when met and joined, represent a far greater consensus than any other executive body." (JA74.) He concluded: "Bringing the attributes of chief executive of his borough to the deliberations of the Board is a vital balancing force." (JA166; *see also* JA69, 416-418.)

The third policy concerns the voting strength each member of the Board holds. (JA394, 418-425.) The allocation of equal votes for each borough president bestows proper recognition on elected leaders of politically equal subdivisions, which fosters collegiality and facilitates the ability and willingness of its members to work together to achieve consensus. (JA69, 458-468.) Equality in voting strength among borough presidents not only assures the expression of local interests on matters of peculiar local concern, but also encourages the borough presidents to understand and care about City-wide problems so as to be able to articulate them within their own boroughs. (JA106, 109, 114, 139, 163, 448-449, 461, 510-511.) This equality also promotes

the deference that the Board traditionally pays to the views of borough presidents on matters affecting their boroughs in particular ways. (JA462.) The wonderful mathematics of the Board, given this tradition, gives the local interests five votes on issues in which the tradition is observed, so that local interests have some chance to prevail if one of the City-wide members does not believe that City-wide interests justify overriding the local view. Equal votes among Borough Presidents make them natural allies against the City-wide majority. Unequal votes would fragment the local perspective. The unanimity of Board action over time (JA94)—in a system in which no action is possible absent support of members representing a majority of the City population—powerfully signals the efficacy of this system.[6]

5. *Preservation of Existing Boundaries*: This Court has frequently noted that the preservation of existing boundaries—historic, geographic, and political—is a legitimate consideration in the makeup of governing bodies. *Brown* v. *Thomson*, *supra*, 462 U.S. at 847; *Mahan* v. *Howell*, 410 U.S. 315, 321-22 (1973); *Davis* v. *Mann*, 377 U.S. 678, 686-87 & n.2 (1964); *Reynolds* v. *Sims*, 377 U.S. 533, 580-81 (1964). This is all the more appropriate here, where the Board exercises the most localized authority over these areas. The courts below recognized such interests as legitimate, but failed fully to appreciate the special role of the borough in New York City government.

That New York's borough boundaries are established geographic, historic and political institutions is beyond question. No legislature decided the basic lines those boroughs follow;

6 It is no answer to argue that, prior to 1958, Queens, Staten Island and the Bronx had only one vote, while the other two boroughs had two. The structure of borough government as well as the Board's powers have undergone substantial changes since the State equalized the voting strength of the borough presidents. No one suggests a return to the pre-1958 formula, which would be subject to the same challenge as the present formula. And, whatever the pre-1958 arrangements, they were superseded almost thirty years ago by borough president equality, which has itself strengthened the tradition of borough president deference. Apportionment according to population would destroy it.

nature selected the boroughs as discrete communities, and history abided the selection. That the boroughs continued to perform basic governmental functions for decades after consolidation of the City solidified their position as the principal sub-City units of governance. The State was well within its discretion to decide that use of these established mechanisms as representative components would facilitate the Board's operation and provide the needed check on central authority.

The important integration of neighborhood, borough and City governmental activities which use of the boroughs achieves brings the City together. The borough presence on the Board of Estimate provides a ready conduit of information from the communities and boroughs to the City. (JA166.) Borough representation on the Board enables local leaders to bring an intimate knowledge of City-wide problems and policies to bear on local problems. (JA106, 109, 166-167, 448.) That the numerous studies of City government in the past eighty-seven years have left the borough representation untouched is a testament not only to the constancy with which the boroughs have earned respect as political units but also to their integral role in keeping the wheels of government running. (JA 409-414.) *See Abate* v. *Mundt*, 403 U.S. 182, 186 (1971) (Rockland County's "long history of, and perceived need for, close cooperation" fostered "extensive functional interrelationships").

6. *The Absence of Invidious Purpose or Effect*: No consideration so permeates this Court's decisions as does its concern that an apportionment be "free from any taint of arbitrariness or discrimination." *Roman* v. *Sincock*, 377 U.S. 695, 710 (1964). This Court has repeatedly "underscored the danger of apportionment structures that contain a built-in bias tending to favor particular geographic areas or political interests." *Abate* v. *Mundt*, *supra*, 403 U.S. at 185-86. The first and most obvious question about any putative justification for an electoral design is whether the intent or effect of the design was to injure a particular segment of the population.

No finding of invidious purpose or effect prompted the courts to invalidate the Board. No party claimed that arbitrary

whim, or racial mischief, or gerrymander explained the Board's design. No facts suggested that a desire to favor or disfavor a class of voters animated the Board's composition or voting system. Nobody asserted that the Board's structure favors the urban over suburban, or hurts any racial or ethnic group. Nothing in the record hints that minority groups are underrepresented or that the Board's design is meant to further some economic or political interests over others. No evidence appeared that the Board was unresponsive to popular will or the hostage of a narrow minority of the City's populace. No one disputed (indeed the trial court found) that wholly neutral, long-standing and substantial public policies informed the Board's structure. To the contrary, plaintiffs explicitly disclaimed any injury other than the allegedly disproportionate voting power, based solely on arithmetic, which the residents of the Bronx and Staten Island are said to enjoy over them. (JS128.)

That injury is in plaintiffs' eyes only. If the consequences of arithmetical discrepancies in borough population denied plaintiffs equal protection of the law, it would not be unreasonable to expect that imbalance to show itself somewhere in the eighty-seven year history of the Board's actions. Yet nothing in the record (or out) remotely supports a claim that the residents of Staten Island or the Bronx enjoy a disproportionate share of the power and resources of New York. (JA506, 509-511.) To the contrary, the smaller boroughs have traditionally been the least potent on the Board; the smallest, Staten Island, is, for example, the repository of the largest garbage dump on the east coast, one soon to acquire the dubious distinction of being "the highest point [of land] along the Atlantic Seaboard." (Verhovek, *Sailing 18,000 Tons of Trash a Day Across the Bay*, N.Y. Times, Dec. 6, 1986, at 31, col. 1. *See also* JA482, 515-516.) To suggest that the residents of this borough (or of the Bronx) enjoy a disproportionate share of the power and resources in New York is to disregard reality.

The absence of any invidious purpose or effect in the Board's design, coupled with the weighty policies that design promotes, establishes that the Board's structure embodies a rational plan

that may reasonably be said to promote legitimate State interests.

That being said, it is hard to understand how the mathematical system used to measure the constituencies of the Board members could possibly become determinative of its constitutionality. Whether one chooses the "disparity" of Ponterio's 16% (JA348) or Banzhaf's 31% (JS42) or *Abate*'s 133% (JS36) or Appellee's original formula of 153% (JA35)—all the products of "reasonable" methods of measurement—the Board remains what it is, does what it does and serves the governmental purposes it serves. The constitutional justification for the Board does not change because one system of reasonable measurement finds a 16% deviation and another 133%. The numbers here are even less compelling because of the difficulty of measuring—with confidence—this three dimensional body, which is unlike any body ever measured by any of the conventional tests.

In applying the equal protection clause to substate regional entities such as the Board, valid non-discriminatory governmental values and policies should take precedence over arithmetic. It is after all reason, not mathematics, that lies at the heart of the equal protection clause.

Conclusion

The Board of Estimate's richly-textured history demonstrates that its composition and voting system enabled the City to recognize the interdependence of activities within its vast region, to temper the most local decisions with regional concerns, and to effect an efficient allocation of resources for the common good. The Board's structure, free of arbitrary or invidious motive, assures majority rule through a unique balance carefully tailored to the peculiar needs of New York City. The Board's makeup injures no one; it instead allows for cooperative action to govern a diverse metropolitan area. The courts below erred in ruling that the Constitution forbids such entities.

"Rather than cause turmoil and foment dissension in a City that has been consolidated for nearly a century, and rather than promoting divisiveness among its five borough members," New York's Mayor Koch concluded his affidavit below, "I respectfully request that the Court treat the Board as it would a still ticking, old and treasured timepiece, and leave its inner workings undisturbed." (JA506-507.)

In other words, in more blunt New York fashion: If it ain't broke, don't fix it.

The judgment below should be reversed and the case remanded with instructions to enter a judgment declaring sections 61 and 62 of the New York City Charter to be valid.

Dated: June 13, 1988

Respectfully submitted,

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

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In The Supreme Court of the United States

October Term, 1987

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, individually and as Mayor of New York, ANDREW STEIN, individually and as City Council President, HARRISON J. GOLDIN, individually and as Comptroller for the City of New York, HOWARD GOLDEN, DAVID N. DINKINS, STANLEY SIMON, CLAIRE SHULMAN, RALPH J. LAMBERTI, each individually and as Borough Presidents of the boroughs of the City of New York,

Appellants,

-and-

ROBERT A. STRANIERE, individually and as a member of the New York State Assembly,

Intervenor-Appellant,

-against-

BEVERLY MORRIS; JOY CLARKE HOLMES; JOANNE OPLUSTIL,

Appellees.

FRANK V. PONTERIO,

Intervenor-Appellant,

-against-

BEVERLY MORRIS; JOY CLARKE HOLMES; JOANNE OPLUSTIL,

Appellees.

BRIEF SUBMITTED BY JOHN J. MARCHI OF THE CITY OF NEW YORK AS AMICUS CURIAE

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BRIEF SUBMITTED BY JOHN J. MARCHI OF THE CITY OF NEW YORK AS AMICUS CURIAE

SUMMARY OF ARGUMENT

The lower courts committed fundamental error by analyzing the degree of voter inequality present on the Board of Estimate without including the three dominant members of the Board, the three citywide officials who hold 55% of the votes of the Board. Despite the statement in the first circuit court opinion that the presence of the citywide officials presented "novel" issues which should be assessed, the district court ignored the citywide officials. For this reason, their analysis and resulting computations are meaningless.

The lower courts also erred in conducting an analysis of the Board in a vacuum—by viewing the Board as a structure standing alone, rather than as one piece of the delicate mosaic that is the New York City governmental structure. The exceptional New York City governmental structure includes a strong mayor, a comptroller and a city council president, all elected on a citywide basis; a unilateral legislature, the City Council, with districts drawn strictly on a population basis; and the Board of Estimate, purposely established to give each borough meaningful representation in City governance. This entire governmental structure deals with the immense pressures facing New York City and attempts to meet the greatly varying problems of all New Yorkers, whose ranks are much larger than merely census population. The unique City of New York, the financial and banking capital of the world, the host to the largest diplomatic population in the world, the home to hundred of thousands of illegal aliens and countless homeless people, has deliberately set in place a governmental structure to blend citywide concerns with local interests. And yet, the courts below dealt a crippling blow to this structure "by the uncritical, simplistic and heavy handed application of sixth grade arithmetic." (*Lucas v. Colorado Gen. Assembly*, 377 U.S. 713, 751 (1963), Stewart, J. *dissenting*).

Finally, the brief argues that without meaningful representation on the Board, the people of the borough of Staten Island, who live in a borough totally different from the rest of the city, will be left with no real voice in the determinations that impact so greatly upon the quality of their life. If the decision of the

lower courts is allowed to stand, an implied contractual condition of the 1898 consolidation, namely meaningful representation within city governance, will be breached. We respectfully request that this Court either allow the Board to remain in its present form or deem the contract of consolidation voidable with the option to the voters of Staten Islanders to remain a part of the City of New York or to become a separate governmental entity.

STATEMENT OF INTEREST OF THE AMICUS CURIAE

As is detailed in the Affidavit I submitted to the District Court (Joint Appendix, hereinafter cited as "J.A.", 431-449), I represent the 24th Senatorial District in the New York State Senate, which encompasses all but a small portion of Staten Island. I was first elected to the Senate by the voters of Staten Island in 1956 and have served as a senator continuously since that time. Since my election in 1956, I have been intimately involved with legislation concerning the City of New York, having served as Chairman of the New York State Senate Committee on the Affairs of New York City from 1963 to 1973 (except in 1965, when my political party was not in the majority). From 1973 to date I have served as Chairman of the New York State Senate Finance Committee. For several years I have been the lead sponsor on many, if not most, of the bills in the New York City legislative program. My interest in and concern for the City of New York sparked two ill fated runs for New York City Mayor in 1969 and 1973.

My strong involvement in the governance of the City and State of New York prompted my intervention as an amicus curiae supporting the appellants in this litigation in 1983, after the first circuit court decision remanding the case to the district court. As I argued in the briefs submitted to both courts below, it is imperative that the structure of the Board of Estimate be retained as presently composed. I respectfully submit this brief in support of the proposition that the Board of Estimate's voting structure is constitutional.

POINT ONE

THE COURTS BELOW ERRED IN NOT CONSIDERING THE CITYWIDE OFFICIALS IN ITS ANALYSIS OF THE BOARD OF ESTIMATE.

In making their determinations concerning the degree of voter inequality present on the Board of Estimate, the courts below committed a fundamental error which rendered their computations meaningless—they determined that an analysis of the Board could be made by discounting entirely the presence of the three citywide officials.

During the first trip to the circuit court, Judge Lasker, speaking for the unanimous bench in remanding the case, stated "the district court must determine the degree of malapportionment present (after deciding on the appropriate methodology for doing so)" (Appendix to Jurisdictional Statement, hereinafter cited as "J.S.A.," at 201). In a footnote which modified the foregoing statement, Judge Lasker quite accurately noted "the fact that three members of the Board are elected at large from the entire city raises novel issues as to how an individual voter's opportunity to elect these members should be assessed in conjunction with his opportunity to elect his borough representative" (J.S.A. 207). Honorable Justices, I am not offended by the profferment of a good question. While a dictionary definition indicates that "should" is tantamount to an order, the district court airily dismissed this directive and rejected the view that the Board posed novel questions, stating that its "essential electoral design is unexceptional and does not present first impression problems" (J.S.A. 136).

To justify the disregard of the citywide members of the Board, the district court cites five cases in which the presence of at-large members of legislative bodies were not included in calculations to determine the degree of malappointments.[1] Each

1. At J.S.A. 137-138, the following are cited: *Latino Political Action Committee Inc. v. City of Boston*, 568 F. Supp. 1012 (D. Mass. 1983), involving the City Council of Boston, Massachusetts. *Cohen v. Maloney*, 410 F.Supp. 1147 (D.Del. 1976), involving the City Council of Wilmington, Delaware; *Markoe v. Legislation of Virgin Islands*, 592 F.2d 188 (3rd Cir. 1979), involving the Senate of the Virgin Islands; *Perry v. City of Opelousas*, 515 F.2d 639 (5th Cir. 1975) involving the Board of Aldermen of Opelousas, Louisiana) and *Martin v. Venable*, 401 F.supp. 611 (D. Conn. 1975), involving the Town Council of Stratford, Connecticut.

of these cases dealt with small legislative bodies in cities which are in no way comparable to New York City, either in terms of demography and size, or governmental structure. In all of these cases, each at large and each district member had one vote, with the district members together always holding the majority of votes. In each of these cases, the at large member was elected by the voters for the specific purpose of serving on the legislative body in question and was not a member of the body by virtue of another office he held. Despite all of these differences, the district court found that these cases were "sufficient decisional precedent . . . to avert—as unwarranted—an unchartered departure" from the *Abate* formula (J.S.A. 138).

In round 2 in the circuit court, the bench, this time minus Judge Lasker, reacted with indifference to the disregard of the citywide officials, stating that if the citywide officials had more than a 6-5 majority on the Board "a different analysis might be called for" (J.S.A. 44). The court called the appellants' distinction between the at-large votes being a minority or majority of the Board a "red herring" (*id.*), finding "no evidence that . . . the distinction on which the appellants rely is a qualitative difference as opposed to a difference in degree" (*id.*). In his concurring opinion, Judge Newman (who is the only judge who was on the circuit court benches for both decisions), qualifies the court's decision on this issue, explaining "what we have not decided and need not decide, is the point at which an apportionment according substantial voting power to at-large representatives would satisfy constitutional requirements, notwithstanding otherwise unacceptable deviation among the . . . districts" (J.S.A. 53-54). Additionally, the circuit court justified disregarding the citywide officials from the analysis of the Board on the basis that "the citywide Board members and borough presidents represents different interests, and that this divergence justifies measuring deviation from voter equality by applying the *Abate* test to the borough presidents alone" (J.S.A. 30). Here the court loses me completely—isn't the fact that the citizens of the entire city vote for the citywide Board members who represent the entire city, while the citizens of each borough vote for their borough presidents who represent that borough, exactly the reason why Judge Lasker directed that there be a consideration

of the novel presence of both citywide and district members on the Board?

Any representative body is a sum of its parts—the part is not one thing and the sum another. The body that is the Board of Estimate is composed of two distinct, yet totally dependent and inseparable parts. The major component is the citywide portion with 3 citywide members elected by all the city electors, holding 55% of the Board's vote. Those citywide members can hail from anywhere in the city, could in fact reside in 3 abutting apartments in one building in any one borough. Those citywide officials have the obligation to represent the entire city, to effectuate a realistic and progressive consensus that benefits the entire city. The minor component of the Board, with 45% of the votes, is the district, or borough portion, with 5 borough presidents individually elected by the electors of their boroughs, who together comprise all city electors. By the elimination of the three citywide members, the district court was able to use the simple *Abate* test, and preclude the complications presented by the presence of the citywide officials.

Both Courts below failed to consider the Board members in terms of anything more than the number of votes cast on the Board. The mayor, for example, who has overwelming power in all aspects of city life, sits on the Board as the mayor (not as an at-large Board of Estimator), casting two out of the eleven total votes. Through his various mayoral agencies, he proposes most of the Board's agenda items—land use and zoning changes, leases, contracts, franchises, etc. The comptroller, who possesses overwhelming power in the financial affairs of this city, sits on the Board as the comptroller (not as an at-large Board of Estimator), casting two votes out of the eleven total votes. As comptroller, he audits the financial transactions and expenditures of the city. Examination of the genesis of a typical Board of Estimate agenda item illustrates the special and dominant role of these two citywide officials. The Department of Transportation (DOT), a mayoral agency, is responsible for negotiating leases for commercial space at the ferry terminals. DOT will issue a request for proposals, select the most favorable proposal and negotiate the lease with the prospective lessee. If the mayor's agency is not satisfied with the lease, the process

does not go any further. If the lease is satisfactory, its terms are then reviewed by the comptroller. If a decision is made by the mayor and comptroller to proceed with the lease, the proposed lease is signed by the lessee and DOT has it placed on the Board of Estimate calendar for approval. Both the mayor and the comptroller, who have played pivotal roles in the formation of this lease, will then vote as members of the Board on its approval. Their power and influence over this item is obviously not to be measured merely in terms of their 4 out of 11 votes.

Because of the instrumental role played by these citywide officials in the generation of most of the items on the Board's agenda and by virtue of the other substantial powers of their elective offices, the mayor and comptroller are the dominant members of the Board. The different roles played by the borough and citywide officials was recognized by Sayre & Kaufman in their seminal work on New York City government:

> "The Borough Presidents bring to the Board neither the impressive formal powers of the Mayor or of the Comptroller, nor the ambiguous potential of the President of the Council: instead, each Borough President . . . has the formal capacity to claim that he speaks, as no other member of the Board can, for the specific interests of his borough." (W. Sayre & H. Kaufman, *Governing New York City* (1960), J.A. 281).

This dominance of the citywide officials led Chief Judge Weinstein of the Eastern District of New York, who was then Professor Weinstein, to conclude that the current voting structure of the Board did not present a substantial federal issue "in view of the control exercised by the officials representing the entire city" (Weinstein, *The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government*, 65 Col.L.Rev. 21, 39 (1965). Despite the importance of and the significant power exercised by these citywide officials, the courts below refused to even consider these members in their analysis of the Board.

Additionally, by refusing to delve into the citywide component the lower court missed one single, yet vital fact concerning the election of those members—the voters in the larger boroughs have a more significant opportunity to influence the

outcome of a citywide vote, and thus have more political clout with the citywide members of the Board.[2] An analysis of the effect of an individual borough president's vote is particularly significant in our case not merely because of the unusual composition of the Board, but because of the city's peculiar geography. With one borough a peninsula, two boroughs distinct islands and the fourth and fifth boroughs tips of another island, the boroughs are identifiable parts of the City, with special needs and concerns. No other borough is comparable to Manhattan (perhaps because there is no other place in the world comparable to Manhattan). There is also no other borough comparable to Staten Island, which until the building of the Verrazano Narrows Bridge in 1964 had no land connection to the other boroughs.[3] While the Staten Island voters obviously have complete control over the election of their borough member of the Board, those voters lack any opportunity to have their influence felt in the election of the citywide members. As Justice Brennan pointed out in *Mahan v. Howell,* 410 U.S. 315 at 348 (1973) "it should be obvious that as a voter's concern with regional or statewide issues increases relative to his interest in county issues, the significance of voting outside the county will correspondingly diminish." Staten Island, the only non-million population borough has very little influence in citywide races (the collective votes of all Staten Island electors have never made a difference in any citywide election since the turn of the century consolidation), while Brooklyn and Queens have significant influence. The second circuit opinion recognized the influence of the bigger boroughs: "it may be that citywide representatives will be more responsive to 'Brooklyn's interests' because of the greater number of Brooklyn votes," and that this "may mitigate somewhat the effects of the deviation in voter equality" (J.S.A. 47). However, the court rejected placing any significance on this phenomena, stating that it is at best "theoretical" and "in no way substantial enough to counteract the 132.9% deviation." (*id.*) I beg to differ, as a Board of Estimate vote of fairly recent vintage illustrates.

2. The larger boroughs also have significant representation in the other governmental structures that form New York City governance, as will be discussed at length in point two of this brief.

3. The uniqueness of Staten Island will be discussed at length in point three of this brief.

In the affidavit I submitted to the courts below, details of a 1984 Board vote on 8 resource recovery plants were related (J.A. 447-448). While the need for constructing resource recovery plants in the 5 boroughs to deal with the city's 22,000 tons a day of garbage "was universally acknowledged, the practical problem of where to locate the plants which would undoubtedly generate opposition from residents living near the proposed sites, remained." (J.A. 447) A mayoral agency, the department of sanitation, formulated a plan which specified the location of the first 5 of these resource recovery plants, 1 in each borough, and placed the plan on the Board of Estimate's agenda. The specified Brooklyn location was the Brooklyn Navy Yard, in the Williamsburg section of Brooklyn (with a population of less than 100,000) (J.A. 448). The Williamsburg residents raised vociferous objection to the proposals, and won the vital support of Brooklyn Borough President Golden, with his 1 Board vote, New York City Comptroller Goldin, with his 2 Board votes and New York City Council President Bellamy, with her 2 Board votes. Newspaper accounts document that the opposition to the resource recovery plants on the part of Messrs. Golden and Goldin was solely based on the Williamsburg issue. Borough President Golden stated that the plan "unfairly subjects the Williamsburg community to an experimental technology" (*N.Y. Times,* Dec. 21, 1984 B5 Col. 3), while Comptroller Goldin explained that "although he generally agreed with the plan, he opposed the location of the resource recovery plant . . . near the Williamsburg section of Brooklyn" (J.A. 448). The resource recovery plants did, however, pass by a 6 to 5 vote since the mayor and the 4 non-Brooklyn borough presidents voted for it. If the Board had then been apportioned under the weighted vote scheme proposed by the Appellees (J.A. 350) the resource recovery plan would have been defeated, since the 16 votes of the Brooklyn Borough President, combined with the 20 votes of Comptroller Goldin and the 20 votes of Council President Bellamy would have made up the majority, by 56 to 54. Being part of the colossus Brooklyn, which would have a borough president with 16 votes in a restructured Board and has a 2.3 million borough population of vital importance to the re-election of citywide officials, the residents of

Williamsburg (or any similar Brooklyn community) can have their voice thunderously heard. On the other hand, Staten Island's 350,000 people, with a borough president having 3 votes in a restructured Board would hardly be able to muster a wimper.

In addition to providing a meaningful analysis of the Board, both courts also failed to grasp the reality that the Board functions as but one part of the amalgam which is the New York City governmental structure. Through these errors, the courts below dealt a heavy blow to the structure of New York City "by the uncritical, simplistic and heavy handed application of sixth grade arithmetic" (*Lucas v. Colorado Gen. Assembly*, 377 U.S. 713, 750 (1963), Stewart, J. *dissenting*).

POINT TWO

THE COURTS BELOW ERRED IN VIEWING THE BOARD AS AN INSTITUTION STANDING ALONE, RATHER THAN AS PART OF THE ENTIRE STRUCTURE WHICH GOVERNS OVER ALL THE PEOPLE OF THE CITY OF NEW YORK, WHOSE RANKS ARE MUCH LARGER THAN MERELY CENSUS POPULATION.

The courts below erred in not considering the entire structure which governs New York City in determining whether the equal protection clause has been violated. The Board is an exceptional institution, one part in the nearly century old governmental structure of New York City—a structure which is a unique amalgam of a strong mayor, a comptroller, and a president of the city council; a unilateral legislature (City Council); and a Board of Estimate. The mayor, the comptroller and city council president are elected by all the voters of the City. The City council is divided into 35 districts, each drawn on population basis; the Board of Estimate is (and has been since 1901) composed of a mix of the three citywide officials (the mayor, comptroller and president of the city council, who are all elected on a citywide basis) and the five borough presidents. The Board was purposely established to deal with local matters, encompassing primarily the use of city land and the grant of city contracts, by blending citywide and borough interests. All these entities together

make up the unique structure which governs the extraordinary City of New York. It is impossible to separate one part of the delicate mosaic that is New York City government and draw any legitimate conclusions about voter inequality. It is axiomatic that computations which are supposed to characterize an entity must accurately reflect what that entity is in reality, not how it may look in an artificial vacuum. The courts below declared unconstitutional New York City government by applying a single mathematical calculation to only one part of the membership of only one piece of the amalgam. In so doing the governmental structure of New York City was grossly mischaracterized and resulted in error which must be rectified by this Court. Indeed, the structure which governs more than seven million people is "far too subtle and complicated a business to be resolved as a matter of constitutional law in terms of sixth grade arithmetic" (*Avery v. Midland County, et al.*, 390 U.S. 474, 510 (1967) Stewart, *dissenting*).

The Board of Estimate is not a legislature and cannot enact any laws, nor levy any taxes. All the legislative powers in New York City are vested in the New York City Council, whose members are elected from districts drawn on a strict population basis. There are currently 35 members of the City Council, with the following breakdown according to borough: Brooklyn-11½ (Brooklyn shares one district with Staten Island); Queens 9; Manhattan-6½ (Manhattan shares one district with the Bronx); Bronx-6½; Staten Island-1½. The Council members from the two most populated boroughs, Brooklyn and Queens, with 19½ votes comprise more than the majority of votes on the City Council. The City Council is the only governmental body in New York City which can enact laws, levy taxes or confirm mayoral nominees to commissions (*N.Y.C. Charter* §21). The New York State Legislature, composed of a Senate and Assembly, with districts drawn on a strict population basis, also plays an important role in enacting legislation dealing with all political subdivisions of the State, with particular emphasis on its biggest locality, New York City. Any laws dealing exclusively with New York City can only be enacted after receipt of a "home rule request" from the local legislative body, the city council (*N.Y.C. Constitution*, Article IX §2, *N.Y.C. Charter*,

§21). Only the City Council can provide the consent of New York City to the passage of these laws by the State Legislature, with the Board of Estimate playing no part in this process.[4] Since the State Legislature is apportioned on a population basis, the large New York City boroughs have far greater representation and far greater voice in determinations concerning State legislative action than the smaller boroughs. For example, the borough of Brooklyn has 19 members of the Assembly, Queens has 15, and Staten Island has only 3. The borough of Brooklyn is represented by 8 Senators, Queens by 5½, and Staten Island, 1¼. In addition, in every legislative session since 1975 the Democrats were and are in control in the Assembly, with the powerful Speaker of the Assembly hailing from the borough of Brooklyn.[5]

The mayor, the comptroller and the city council president are also integral pieces in the mosaic known as New York City government. The mayor, who is elected on a citywide basis appoints the heads of all administration departments, all commissioners and all of the non-elected city officials, with a few specific exceptions.[6] To name some of the activities for which the mayor is responsible: all seven members of the City Planning Commission, which has primary responsibility for the conduct of planning in the city, are mayoral appointees who serve at the mayor's pleasure; the Department of General Services, which is responsible for managing city-owned buildings and administering city construction programs is a mayoral agency; the Departments of Social Services, Transportation and Personnel, are all mayoral agencies; the mayor appoints all the non-ex-officio members of the New York City Health and Hospitals Corporation, which runs all city health institutions. There is no doubt that the mayor's role in city governance is awesome.

4. The local legislature can authorize a home rule request by a majority vote of its members together with the approval of the mayor or by a two thirds vote of its members alone. In all areas of the state other than New York City the necessity of receiving a home rule request from the local legislature can be waived, upon a certificate of necessity from the governor stating an emergency situation and a two thirds vote of both houses of the state legislature (*N.Y.S. Constitution* Article IX §2).

5. The Democrats controlled the Assembly in the following years 1935, 1959-1964; 1965-1968; 1975-present—in each of these years the Speaker was from Brooklyn. The years in which the Republicans controlled the Assembly, the minority leader was from Brooklyn.

6. For example, the comptroller has the authority to appoint the deputy comptrollers (*N.Y.C. Charter* §94).

The comptroller is elected on a citywide basis, at the same time and for the same term as the mayor. He has the power to investigate all matters relating to or affecting the finances of the city. The City Charter mandates the comptroller audit all financial transactions and official accounts and expenditures of the city, as well as the operations and progress of all city agencies (*N.Y.C. Charter* §93). The comptroller has the power and duty to audit all vouchers for payment before any city money is expended, has the power to settle and adjust all claims in favor of or against the city, and administers and manages the several sinking funds of the city and all other trust funds held by the City (*N.Y.C. Charter* §91).

The president of the city council is elected citywide at the same time and for the same term as the mayor. He serves as the "ombudsman," and is given the Charter responsibility for the "coordination of citywide citizen information and service complaint programs," the "review of complaints of a recurring and multi-borough or citywide nature relating to services and programs, and making "proposals to improve the city's response to and processing of such complaints" (*N.Y.C. Charter* §23).

Along with the City Council, the State Legislature, the mayor, the comptroller and the city council president, the final piece in the mosaic that is New York City government is the Board of Estimate. The Board of Estimate, with its function to negotiate and enter into contracts on behalf of the city, to determine the development of all city-owned property, to approve and modify zoning requirements, makes the determinations which have the greatest local import.

In *Avery v. Midland County*, in which this Court extended the equal protection clause's applicability to the Midland County Texas Commissioner's Court, Justice White stressed that "this Court is aware of the immense pressures facing units of local government and of the greatly varying problems with

which they must deal." (390 U.S. 474 at 484 (1968)). It is not an overstatement that no locality in our country is faced with more intense pressures than New York City. We respectfully request that this Court not lose sight of the fact that this case does not concern a City Council in Wilmington, Delaware or a Board of Aldermen in Opelousas, Louisiana. We are dealing with an integral part of the delicate structure which governs 7 million people, with diverse needs, concerns and problems.

In the affidavit submitted by David Jaffe, the district court was asked to take judicial notice of the volumes of statistical data and reports "which clearly demonstrate that New York City is different from any other governmental entity in the United States . . ." (J.A. 490-491) New York City, with its 7 million people, is larger than any other city in the United States and is larger than forty one states; the four largest New York City boroughs (all but S.I.) individually would rank higher in population than all but six United States cities. The budget of New York City $17.2 billion in 1984, is bigger than the budget of numerous countries including Argentina, Columbia, Denmark, Greece, India, Ireland, South Korea, Portugal, Switzerland, Thailand and Turkey (J.A. 491).

The unique nature of New York City's population is also an important reason why a requirement of population apportionment should not be imposed on the Board of Estimate. In the proceedings below, the "parties stipulated that the population of the city of New York is 7,071,030 and that the population of Brooklyn is 2,230,936, Queens 1,891,325, Manhattan 1,427,533, the Bronx 1,169,115 and Staten Island 352,121" (J.S.A. 9-10). However, a mere recitation of the latest census count does not even come close to depicting accurately the people who together comprise New York City. Consider, for example, the fact pointed out in the Jaffe Affidavit, that more than one out of seven persons residing in New York City are not

citizens of this country and thus are not entitled to vote.' (J.A. 492). Perhaps even more significantly, there is estimated to be as many as 500,000 unregistered, illegal aliens who have not been counted for census purposes and thus were not included in the figures which formed the basis of the calculations arrived at in the proceedings below (*id.*). These illegal aliens, as well as the thousands of homeless persons[8] who live in city shelters or on city streets are a very real part of New York City, utilizing city services, impacting upon the city fisc and creating problems which must be dealt with on a borough and citywide basis by the Board of Estimate.

There are other very significant blocks of people who make New York City what it is and who are not included in the census figures—the financial and banking community and the diplomatic community. New York City is the financial capital of the world and residence of numberless multinational entities and as such is the daily host to tens of thousands of non-resident commuters. Also, as the headquarters of the United Nations, New York City is the host to over 160 nations, and has the largest diplomatic population in the world, numbering over 35,000 persons.

There is no doubt that New York City is much more than just a municipality with a population of 7 million people. There

7. As Mr. Justice Brennan explained in *Burns v. Richardson,* 384 U.S. 73 at 92 (1966) "aliens, transients, short term or temporary residents, or persons denied the vote for conviction of crime" do not have to be included in the apportionment base. New York Law allows land legislature bodies to apportion using a population base of residents, citizens or registered voters. (*Municipal Home Rule Law* §10(13). While an apportionment based on registered voters would probably not pass constitutional must (*Burns v. Richardson, supra* at 92-93), New York City could exclude aliens from its apportionment base, which would result in a completely different borough by borough population.

8. These homeless persons are often not even from New York City. For example, the *N.Y. Times* reported that nuns who run a homeless shelter in Hoboken, New Jersey, send an average of five persons a night to New York City where facilities are set up outside the train station for feeding homeless people "while they wait for a city van to pick them up and take them to public shelters." (*N.Y. Times,* 1/25/85 at B1).

is no doubt that the people which the city serves and over which the governmental structure must govern are much more than a mere compilation of the census figures in the five boroughs. Yet, the Courts below dealt a crippling blow to New York's governmental structure by merely looking at numbers of people. As Justice White aptly pointed out in *Gaffney v. Cummings:*

> " 'An unrealistic overemphasis on raw population, a mere nose count in the districts, may submerge these other considerations and itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement.' " 412 U.S. 735 at 749 (1973)

By basing their calculations on "raw population" figures and applying those figures to only one part of the amalgam that is New York City government, the courts below totally "submerged other considerations" and "ignored important factors in the day to day operation" of the unique City of New York.

POINT THREE

IF THE LOWER COURTS' DETERMINATIONS ARE UPHELD, STATEN ISLAND WILL BE LEFT WITHOUT MEANINGFUL REPRESENTATION IN CITY GOVERNANCE, WITH THE PERFORMANCE OF AN IMPLIED CONDITION OF CONSOLIDATION RENDERED IMPOSSIBLE.

An implied condition underlying Richmond County's entrance into Greater New York was its retention of a meaningful voice in determining its future.[9] It is significant to note that the appellees agree that Staten Island would never have chosen to consolidate unless its citizens believed they would have a meaningful representation in New York City governance—this is a position with which "of course plaintiffs do not disagree" (J.A. 544). Additionally, the district court accepted this theory of a

9. The circumstances surrounding Richmond County's entrance into Greater New York are detailed in various submissions to the courts below. *See* Aff. of John J. Marchi, at J.A. 433-435; Aff. of Loring McMillen, at J.A. 452-456, Aff. of Les Trautmann, at J.A. 479-480.

breach of an implied contractual condition, but held that "any such tacit agreement as has been nullified by post *Baker v. Carr,* 369 U.S. 186 (1962) case law" (J.S.A. 80), stating that "this latter day jurisprudence abrogated Staten Island's turn of the century implied condition." (*id.*).

Without meaningful representation on the Board of Estimate, the people of Staten Island will be left without a voice in city government. As has been detailed in Point One of this brief, Staten Island is the least populous of the 5 boroughs and has very little representation on the city council, and in the New York City delegation in the state legislature. Additionally, Staten Island "rarely enjoys any political clout" with regard to influencing the elections of citywide officials (J.A. 485, 486—this is discussed at length in Point One of this brief, *supra*). With a Board of Estimate apportioned on a population basis, Staten Island's board representative would be reduced to a mere observor. With a Board of Estimate apportioned on a population basis, Brooklyn would be able to exercise inordinate control over the determinations that greatly affect Staten Island.[10] The devastating effect of Staten Island's loss of meaningful participation on the Board becomes even clearer when one considers two facts: Staten Island, as all parties admit, is the one borough which is different from the rest of the City; Staten Island, with its vast amounts of undeveloped land, is disproportionately affected by the Board's decision.

It is beyond dispute that Staten Island is different from the other boroughs. The Staten Island of today, just as the Staten Island of the consolidation era is "an anomaly, a suburban borough in sharp contrast to the other four urbanized boroughs of New York City . . . almost everything about Staten Island is sharply different from the rest of the City" (*Aff. of Trautmann,* J.A. A478-479; *see also Aff.* of *Regan,* J.A. 473-474; *Aff. Jaffe,* J.A. A489-492). Staten Island is the only borough where

10. If the Board of Estimate were strictly apportioned on a population basis, Manhattan, whose revenues largely support the rest of the City (with modest help from Staten Island) and the piteously fiscally dependent Bronx would suffer a diminishing of voting power. This is most significant when one considers that the Manhattan and Bronx borough presidents are the only minority members of the Baord.

the majority of housing units are owner-occupied; the only borough where primary transportation reliance is on automobiles rather than mass transit; the only borough where mass transit is totally surface transportation, almost totally by bus; and the only borough where car users face a four dollar bridge toll to reach the nearest borough, Brooklyn, when other city and state motorists are able to reach other boroughs gratis. In numerous ways, the interests and concerns of Staten Island are different from those of the rest of New York City. As has been previously discussed, the Board was purposely established to insure that the needs of each borough are blended with citywide concerns. When this Court in *Dusch v. Davis* (387 U.S. 112 (1967)) spoke with approval of the borough composition of the Council of Virginia Beach, it could easily have been describing the policy reasoning behind the current composition of the Board of Estimate, saying that it refects:

> "a detente between urban and rural communities that may be important in resolving the complex problems of the modern megalopolis in relation to the city, the suburbia and rural countryside." (*id.* at 117).

With a Board of Estimate strictly apportioned according to population, the unique interests of the people of Staten Island could never be adequately voiced within the governmental structures in New York City. The devastating impact of this lack of representation is magnified when one considers the fact that most of the city's undeveloped land is on Staten Island (J.A. 515).

The one governmental agency that has the most influence over how this land is used and developed is the Board of Estimate. "The Board's land use and planning authority makes it the pre-eminent body directing real estate development in a city marked by extraordinary land values [and] acute housing shortages." (Charo, *Designing Mathematical Models To Describe One Person One Vote Compliance by Unique Governmental Structures: The Case of the New York City Board of Estimate*, 53 Ford. L. Rev. 735 at 737 (1985)).

How the Board of Estimate exercises its enormous land use power in the next decade will irrevocably determine the future

character of Staten Island, since planners now assert that Staten Island will be "built out" within ten years (J.A. 486). In his submission to the Court below, the current Staten Island Borough President, Ralph Lamberti, summarized the overwhelming significance of the Board's land use decisions:

> "Staten Island's undeveloped land and its remoteness from the rest of the City has for decades provided an irresistible temptation to dump every imaginable undesirable project on our shores. Study after study has demonstrated that Staten Islanders have an excessive incidence of lung cancer. There can be little doubt that a major contributing factor is the high toxic pollution of our air. Yet, within the past few years alone, not only were we confronted with plans to site a major coal and garbage burning power plant here, but also to construct a coal-slurry terminal and pipeline which would have destroyed waterfront and neighborhood properties on two Island shores. With the . . . closing of all other City landfills, there are now plans to continue to pile garbage at Fresh Kills until it reaches a height of 500 feet, higher than the highest natural surface on the Island. Even with an equal vote on the Board, our success in fending off these life-threatening intrusions has been marginal. These are not matters merely of personal annoyances or evidence of a 'not in my backyard' mentality. They are clear and present dangers to the well being of my constituents." (J.A. 515, 516).

The Appellees discount Lamberti's concerns by arguing that Staten Island is "first and foremost a borough of New York City. As such, its land-use planning is to be exercised for the benefit, not only of Staten Islanders, but also for citizens of the entire City" (J.A. 540-541). This statement precisely sums up the reason why Staten Island's concerns are realistic—with no voice in the Board's determinations, if a conflict arises among borough interests, Staten Island's interests will necessarily fall. This statement also precisely sums up the reasoning why the Board's current composition was established, namely the blending of borough and city concerns: "the Board of Estimate is well structured to make important political decisions and to resolve conflicts between city-wide and local in-

terests . . ." (*New York State Charter Revision Commission* at 1 (1975)).

It is clear that Staten Island would never have agreed to be consolidated into New York City unless it had a meaningful voice in New York City Government. It is beyond question that if the decision below is allowed to stand Staten Island will not have any true voice in that government. This implied condition of the contract of consolidation is being breached by the lower courts' decision.

This Court should not allow the decision below which eradicates such an essential element of the consolidation that enticed Staten Island to give up its independence to be permitted to stand. It should allow the Board of Estimate to remain in its present form or in the alternative the original contract of consolidation should be deemed voidable with the option to the voters of Staten Island to remain a part of New York City or to become a separate governmental entity.

CONCLUSION

This Court's acceptance to hear and review this litigation elevated over expectations that the crippling blow dealt to New York City government by the Courts below would be healed and justice for all New Yorkers would finally prevail.

The honorable members of this Court, constituting as it does the ultimate bower of our freedoms will cast a long shadow of decisive importance as our population marches into the next millennium. If the lower courts' decision is left intact, the obvious solution to politically vexing or difficult decisions made by a largely indifferent, heavily urbanized New York City would be to develop an unacceptable resolution on Staten Island. The lower courts' scenario would condemn the people of Staten Island to the role of a thoroughly and permanently defeated minority without the benefit of even the flimsiest defense against dissimilar multitudes residing miles away, across a choppy bay.

The Board's current composition and voting structure assures that each resident in all parts of the diverse city is adequately represented. The Board assures the result, epitomized by the medieval cry which hastened the decline of feudalism,

that "city air makes free." As cities grow larger and relationships more complex, it is necessary for jurists to apply his or her jeweler's eye more carefully to assure that city air can insure meaningful participation of all city residents.

The Board of Estimate has been

> "shaped by the special needs which have arisen during particular times in the City's history. Specifically, it has been a magnet for issues that require deliberate judgments in the best interests of the City as a whole . . . The Board is not a body devised by esoteric social scientists, but rather an institution forged from the singular historical developments and attributes of New York City and its district geographic parts." *New York State Charter Revision Commission* at 1-2 (1975).

For nearly a century the Board has been an integral part of the delicate mosaic that governs over a city now 7 million people strong. The Board, a unique institution in an exceptional city is the grand experiment that works, keeping an incredibly diverse city operating as a single unit.

In reviewing this case, we respectfully remind the Court of the words of Justice Brandeis in his dissent in *New York State Ice Co. v. Liebmann:*

"To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation . . . This Court has the power to prevent an experiment . . . But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold." (285 U.S. 262 at 311 (1931)).

We respectfully request that reason and justice prevail and this Court reverse the lower courts' determination.

Respectfully submitted,

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-v.-

BEVERLY MORRIS, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR *AMICI CURIAE* PETER F. VALLONE, et al.

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PETER F. VALLONE, et al.

STATEMENT OF AMICI'S INTEREST

Peter F. Vallone and the individuals joining in this brief are residents of the City of New York, registered voters and duly elected members of the New York City Council. Pursuant to section 21 of the New York City Charter, the Council, which consists of thirty-five members, is vested with the legislative power of New York City. Mr. Vallone serves as Vice Chairman and Majority Leader of that body.

The courts below held that the Board of Estimate deviated from the constitutional principle of one person, one vote by 132.9%. Based on this finding, it is evident that the votes we cast as citizens are seriously debased and diluted.

This is an injury we share with plaintiffs-appellees. But we also suffer a unique injury in our role as City Council Members. Because New York City's substantial budget can only be adopted after the Council reaches an agreement with the Board of Estimate, the votes we cast as legislators on budget matters are infected by the Board's malapportionment. Whether this taint is measured by reference to the 132.9% deviation found by the courts below, the 31% voting disparity propounded by the municipal appellants or the heightened malapportionment resulting from the non-mayoral voting scheme mandated by the City Charter as to budget matters, it is clear that the Board of Estimate is unconstitutionally malapportioned.

We vigorously protest the disenfranchisement of this City's citizens and strenuously object to the spillover effect of the Board's voting disparities as it affects our legislative powers. We respectfully petition this Court to affirm the lower courts' determination that the Board of Estimate's voting structure deprives this City's citizens of their constitutional right to voting parity.

SUMMARY OF ARGUMENT

On remand from the Court of Appeals, the District Court held that the voting system of the Board of Estimate results in a 132.9% deviation from voting parity. The Court of Appeals agreed with the District Court's calculation and upheld its determination that the Board of Estimate's voting scheme was unconstitutional. The methodology adopted by the lower courts in arriving at this conclusion (the "Abate" method) was correct and should be affirmed on appeal to this Court.

Using a different mathematical model, municipal appellants contend that the correct deviation figure is 31%

and that this voting imbalance is constitutionally permissible in light of the special functions performed by local bodies.

The City Council *amici* vigorously disagree and submit that neither the 31% malapportionment figure espoused by municipal appellants nor the 132.9% deviation determined by the lower courts can be justified or excused.

Municipal appellants wrongly argue that the six citywide votes (two each accorded to the Mayor, the City Council President and the Comptroller) constitute a majority voting bloc on the Board and therefore eliminate or substantially reduce the impact of the conceded disparity among the borough votes. This analysis is incorrect on many grounds, but the principal concern of the City Council *amici* is to demonstrate that, however measured, this unacceptable level of malapportionment impacts on a major governmental function, the adoption of the City's budget, and impermissibly impacts on the otherwise legitimate exercise of the City Council's budget powers.

On a technical level, appellants' analysis is based on several faulty premises and is incorrectly limited to cases in which the Board votes at full strength of its citywide members. This blinkered view ignores the special voting provisions which govern the Board's participation in budget matters. Because the City Charter prohibits the Mayor from voting on budget issues, the putative citywide voting bloc is reduced below majority level and the presumed tempering effect of the citywide votes is necessarily lessened. Consequently, the resulting malapportionment is greater with respect to budget matters. It is *amici's* contention that the resulting spillover effect on the Council's legislative processes is unacceptable and unjustifiable in light of controlling constitutional standards.

ARGUMENT

POINT I

THE COURTS BELOW CORRECTLY HELD THAT THE VOTING SYSTEM OF THE BOARD OF ESTIMATE VIOLATES THE ONE PERSON, ONE VOTE PRINCIPLE

In *Reynolds v. Sims,* 377 U.S. 533 (1964), this Court held that debasement or dilution of a citizen's vote is tantamount to complete disenfranchisement, and that this result will likely occur when "population is submerged as the controlling factor in the apportionment of seats in the particular legislative body. . . ." *Id.* at 581. Although this Court has recognized the need to accord a certain amount of flexibility to local government institutions to accommodate local needs, *Avery v. Midland County, Texas,* 390 U.S. 474 (1968), cited by municipal appellants (Brief at 27), firmly established the principle that "the Constitution permits no substantial variation from equal population in drawing districts for units of local government having general governmental powers over the entire geographic area served by the body." *Id.* at 484-5. Furthermore, although

> "viable local governments may need considerable flexibility in municipal arrangements if they are to meet changing societal needs . . . this [Supreme] Court has never suggested that certain geographic areas or political interests are entitled to disproportionate representation."

Andrews v. Koch, 528 F. Supp. 246, 249 (E.D.N.Y. 1981), *aff'd mem.,* 688 F.2d 815 (2d Cir.), *aff'd sub nom. Giacobbe v. Andrews,* 459 U.S. 801 (1982) (quoting *Abate v. Mundt,* 403 U.S. 182, 185). Cognizant that local bodies should be accorded some latitude in designing suitable

structures, this Court has never indicated that it would accept a deviation of 132.9% (or 31%, if municipal appellants' calculations pass muster) as a constitutionally permissible variance from the principle of "one person, one vote."

We do not intend to repeat at length the various arguments and analyses which defeat appellants' position. In Point II, *infra*, we briefly offer some criticism of certain assumptions made in the Banzhaf Index calculations and propose some arguments to counter municipal appellants' assertion that the outcome of Board votes is determined by a putative citywide voting bloc majority. We believe those issues are adequately aired in the submissions of appellees. We adopt their conclusion that the Board's malapportionment must be cured and respectfully refer this Court to their brief.

Our aim is to highlight the seriousness of the Board's malapportionment as it impacts on the adoption of the City's budget and the spillover effect that malapportionment has on the City Council, specifically as it relates to the Council's exercise of its budget powers.

Section 120 of the New York City Charter provides in relevant part:

> §120. The budget; approval. a. The board of estimate and the council may increase, decrease, add or omit any unit of appropriation in the budget as submitted by the mayor, or add, omit or change any terms or conditions of it.

b. Except as otherwise provided by law, and subject to the veto of the mayor pursuant to section one hundred twenty-one, the board of estimate and the council, by separate concurrent vote of each body, shall adopt a single budget. . . . In the event of a disagreement between the two bodies, each shall appoint members to a conference committee to reconcile differences and to make recommendations to the respective bodies for concurrent vote of each body.

c. If a single budget has not been adopted by the fifth day of June pursuant to subdivision b of this section, the budget and tax rate adopted as modified for the current fiscal year shall be deemed to have been extended for the new fiscal year until such time as a new budget is adopted.

d. *The mayor shall not participate in any action or vote of the board of estimate on the budget.*

. . .

(Emphasis added).[1]

The budget is the framework by which the people of this City set their priorities. Budget allocations quantify City policy and reflect, for example, whether public safety is to be given greater consideration than health matters or if educational needs must be subservient to criminal justice requirements. All of these concerns affect all residents of the City, each of whom is entitled to an equal voice in determining which matters must be given immediate attention and what needs can be deferred.

Notwithstanding the significance of the budget process to the body politic, municipal appellants give, at best, fleeting acknowledgment to what the Court of Appeals

1. These separate voting patterns were noted in the District Court's methodology decision. *Morris v. Board of Estimate,* 592 F. Supp. 1462, 1465, n.2. (E.D.N.Y. 1984).

termed "the Board's substantial role in passing on the City's budget." *Morris v. Board of Estimate,* 707 F.2d 686, 690 (2d Cir. 1983). Municipal appellants minimize the magnitude of the Board's authority over the City's capital and expense budgets (the latter in excess of $25 billion in Fiscal Year 1988), disingenuously arguing that:

> The Board of Estimate . . . has no power to make law. . . . With one limited exception—its narrow participation in the budget-making process—the Board has no say in any action the City Council takes. And, with that one exception, the Board cannot exert power of general applicability to all citizens of New York City.

(Brief at 9). This "narrow participation," in effect, puts the Board on equal footing with the City Council on budget matters.[2] It subjects the Council to the wishes of a grossly malapportioned Board in an arena where the means for implementing and maintaining all of the City's services are determined.

2. Moreover, it represents a substantial and unconstitutional intrusion of an executive body into a purely legislative function and violates the salutary and fundamental principle of separation of powers. The District Court acknowledged the paramount importance of this doctrine and referred to the Board's role in checking the Mayor given his lack of votes on the budget. 647 F. Supp. at 1475. But the Court did not go on to consider the unwarranted participation of the Board, a body of executive officials, in the City Council's legislative processes of budget adoption. We submit that such participation is as equally unconstitutional as the malapportionment of the Board and should provide an alternative ground for affirming the decision below.

At the heart of municipal appellants' argument in support of maintaining the present voting structure of the Board is their contention that majority control of the Board is vested in its citywide members (Brief at 5, 12, 14, 30). Although this argument may have some validity in theory, with respect to non-budgetary matters in which the three citywide officials have a total of six out of eleven votes (but see, pgs. 13-14, *infra*), it is patently untrue with respect to the Board's participation in the budget process, in which the boroughwide interests dominate as a result of the Mayor's exclusion. In budget matters, only two citywide members, having a total of four votes, participate, while the five borough presidents each cast their one vote. Thus, even assuming, *arguendo*, that the Banzhaf Index urged by municipal appellants should apply here, appellants' 31% deviation figure must be adjusted to reflect the Mayor's inability to vote on budget matters. Because the Mayor cannot vote in the budget adoption process pursuant to §129(d) of the New York City Charter, the number of citywide votes is reduced to four. Consequently, the citywide officials' purported influence is lessened from a majority to a minority position and the representational disparity is commensurately increased. This is mathematically demonstrated in Point II, *infra*.

Not only does this supermalapportionment affect the Board's budget decisions, it spills over to and impacts on the City Council's legislative processes. Because the Council can only act with the agreement of the Board, the Council is beholden to a malapportioned body and the Council's decisions on budget matters are necessarily infected by the Board's voting disparity. The City Council has no ability to rectify the resultant malapportionment visited upon it. It should be noted that not even a unanimous vote of the City Council can overrule a majority vote of the Board of Estimate.

The adoption and modification of budgets and fiscal appropriations are functions that are typically committed to legislative bodies such as the City Council. The courts have been particularly vigilant in holding such entities to very low representational variances. *Brown v. Thomson*, 462 U.S. 835 (1983). For this reason, the tolerance of an allegedly innovative, but poorly apportioned structure such as the Board of Estimate to accommodate local exigencies is particularly inappropriate when applied to the exercise of a locality's budget powers. Municipal appellants' argument that the Board of Estimate's voting structure is responsive to the unique nature of New York City government is specious in regard to budget matters. There is nothing inherently unique about the adoption of New York City's budget--except perhaps, its size--which justifies the involvement of a grossly malapportioned Board of Estimate. Contrary to municipal appellants' suggestion, the mere fact that New York City is comprised of five boroughs, each having its own needs and priorities, does not distinguish this City from Miami, or Denver, or any other city which, when making budget decisions, must choose among competing interests. For the purpose of applying the "one person, one vote" principle, there is simply no basis upon which to distinguish the budget adoption process in New York City from other municipalities. As a general proposition, the voting deviations are inexcusable; they cannot be justified in relation to the adoption of the City's budget--a function common to governments everywhere--nor in relation to other, major governmental powers exercised by the Board, such as the adoption of the city's overall land use plan, the Zoning Resolution, or the approval of city-wide contracts. These are not "local," *i.e.*, borough, issues over which the borough presidents should have unequal say. The smaller boroughs simply wield an inordinate amount of power on citywide issues which have no greater impact on their respective citizens than on the citizens of the larger boroughs.

Amici, as members of the City Council, having recently faced, and lost, a similar challenge, are particularly sensitive to the strictures of the Equal Protection Clause as it relates to the one person, one vote issue. This Court, in a memorandum decision, affirmed the rejection of a mix of fair and malapportioned votes within the Council itself, even though the deviation affected less than 25% of the body. In *Andrews v. Koch,* 528 F. Supp. 249 (E.D.N.Y. 1981), *aff'd,* 688 F.2d 815 (2d Cir.), *aff'd sub nom., Giacobbe v. Andrews,* 459 U.S. 801 (1982), the court of appeals affirmed the lower court's holding that malapportionment relating to 10 at-large members (2 from each borough) of the 45-member body, could not be countenanced. The fact that nearly 35 of the Council Members had been properly elected from equally apportioned districts--a number well in excess of any Charter requirement needed to pass any matter or override a mayoral veto--did not insulate the whole body from the malapportionment of less than one quarter of it.

Applying the same reaoning here, 54.5% (6 citywide ballots out of 11 votes on general matters) or 44.4% (4 citywide ballots out of 9 votes on budget issues) will not confer substantial equality on a body whose malapportionment affects 45.5% and 55.6% of its members, respectively.

Moreover, the Board's role in budget matters may easily be eliminated. The City Council already has the statutory authority and functional capabilities to deal with the full range of budget issues. Abrogating the Board's powers over budget matters would only require that the relevant Charter provisions be declared ineffective.

POINT II

MUNICIPAL APPELLANTS' MATHEMATICAL MODEL AND UNDERLYING ASSUMPTIONS ARE INCORRECT

In remanding this case to the District Court, the Court of Appeals noted:

> [T]he fact that three members of the Board are elected at large from the entire city raises novel issues as to how an individual voter's opportunity to elect these members should be assessed in conjunction with his opportunity to elect his borough representative.

Morris v. Board of Estimate, 707 F.2d at 690, n. 3. The district court determined, and the court of appeals affirmed, that the citywide votes had no ameliorative effect on the 132.9% deviation found to exist among the borough votes. We believe that determination was proper.

Municipal appellants argue, however, that this gross malapportionment should be adjusted to account for the citywide officials' putative majority voting bloc. We submit that the reasoning and conclusions propounded to validate this construct are incorrect.

We do not claim any special expertise in devising mathematical models which seek to blend citywide and boroughwide votes. But logic and practical analysis compel us to question whether the underlying assumptions of the Banzhaf Index, on which municipal appellants heavily rely, properly calculate this mix, and whether those and other assumptions made by appellants accurately reflect reality.

First, although appellants strongly emphasize the point, there is no evidence in the record that the citywide officials vote as a bloc. As appellees note in their extensive submissions, the Board's actual vote on any matter (reported as a unanimous consensus more than 95% of the time) appears to result from prolonged backroom negotiations and tradeoffs. (Joint Appendix at 94, 245-246). On controversial issues, the citywide members are likely to vote on different sides, and to do so with no consistent alignment from one dispute to another. (Joint Appendix at 246).

Second, we assert that the Banzhaf Index masks genuinely unacceptable voting disparities. According to the municipal appellants, the Index is able to compare the voting power of individual voters by calculating the voting strength of each representative, determining the citizen's ability to affect the election of each representative and adding together the complete voting power each citizen thus holds. (Brief at 35). The Index appears to confuse and improperly aggregate a voter's ability to affect the outcome of an election to public office with a voter's ability to affect the outcome of votes cast by those public officials as members of the Board. The simple amalgamation of these factors is incorrect and appears to create a multiplier effect for the citywide votes that improperly overvalues their influence, thus in turn improperly overvaluing the influence of the citywide officials and "muting" the deviation figure. *See, Morris v. Board of Estimate,* 592 F. Supp. at 1468-70.

If the ultimate question is how much power a citizen has in affecting the outcome of a Board vote, the Banzhaf Index does not account for the fact that *one* borough's vote (*any* borough's vote) may ultimately carry the day if the other ten votes split, a circumstance that the court of

appeals denominated the "kingmaker" effect. 707 F.2d at 691. Nor does it reflect the critical fact that in such a situation, the individual electors' voting powers differ, depending on whether the tie-breaking vote is cast by Staten Island or one of the more populous boroughs. In reality, 350,000 people have as much power to control the outcome of a Board vote as 2,231,000 people because each group is represented on the Board by representatives having the same strength. We submit that this is unacceptable under equal protection standards.

Moreover, the Banzhaf model does not reflect appellants' contention that Board members defer to each other with respect to projects affecting a single borough. Nor does it account for the supposed unanimity of Board votes.

More importantly, the Banzhaf model upon which municipal appellants rely, totally ignores the unique structure which the City Charter establishes for votes relating to the budget adoption process. Modifying the Banzhaf method to reflect the fact that only two citywide officials participate in the Board's budget process, the Board's malapportionment is significantly greater than that propounded by municipal appellants. When the Mayor's exclusion is factored into the Banzhaf model, the maximum deviation from the ideal is almost 50%. Applying the methodology employed by municipal appellants (Brief at 36-37), the total voting power of the two citywide officials who vote on the budget is calculated as follows:

Voting Power of Comptroller (18.84%) =	.0070853
Square Root of City Population (2659)	
Voting Power of City Council President (18.84%) =	.0070853
Square Root of City Population (2659)	
Total Budget Voting Power of Citywide Officials =	.0141706

Employing this figure in the chart used by municipal appellants (Brief at 37) to determine the voting power of a voter in each of the five boroughs, the deviation figures are as follows:

Borough (Population)	*Square Root*	*Voting Power*		*Voting Power*		*Voting Power*	*Deviation*
Brooklyn							
(2,230,936)	1494	.014171	+	.00582	=	.0200	-7%
Queens							
(1,891,325)	1375	.014171	+	.00632	=	.0205	-4.65%
Manhattan							
(1,427,533)	1195	.014171	+	.00728	=	.0214	-.46%
"Ideal"							
(1,414,206)	1189	.014171	+	.00731	=	.0215	0.00
Bronx							
(1,169,115)	1081	.014171	+	.00805	=	.0222	+ 3.25%
Staten Island							
(352,121)	593	.014171	+	.01467	=	.0288	+ 34%
				Total Deviation:			49.36%

Plainly, a deviation of this magnitude is constitutionally unacceptable and unjustifiable. *Amici* urge this Court to reject municipal appellants' attempt to camouflage the Board's primacy in budget matters. The facts are clear and beyond dispute: the adoption of the City's budget is a governmental function of enormous importance. The Board of Estimate, infected by a maximum malapportionment of almost 50%, plays a major role in the budget process. Consequently, as a result of the Charter's requirement that agreement be reached between the Board and the City Council, the Council's legislative

process with respect to the budget is tainted by the Board's malapportionment. This "supermalapportionment" of the nonmayoral Board must compel this Court to effect a cure of the Board's voting schemes by upholding the decisions of the lower courts.

CONCLUSION

For the foregoing reasons, the City Council *amici* respectfully request that this Court affirm the decision of the court below in its entirety.

Dated: New York, New York
August 3, 1988

Respectfully submitted,

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(16) (14)

Nos. 87-1022, 87-1112

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE BOARD OF ESTIMATE, *et al.*,
Appellants,

v.

BEVERLY MORRIS, *et al.*,
Appellees.

FRANK V. PONTERIO,
Appellant,

v.

BEVERLY MORRIS, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR CITIZENS UNION OF THE CITY OF NEW YORK AS *AMICUS CURIAE*

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UNITED STATES SUPREME COURT
Docket Nos. 87-1022; 87-1112

THE BOARD OF ESTIMATE, et al.,

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v.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF CITIZENS UNION OF THE CITY OF NEW YORK

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Citizens Union of the City of New York hereby respectfully moves for

leave to file the attached brief amicus curiae in this case.

Citizens Union is a non-profit, non-partisan membership organization that was founded in 1897 to promote honest and efficient government for New York City and to fight public corruption. Ever since, Citizens Union has been a leader in the struggle to reform and modernize the government of New York City and state policies affecting New York City. Throughout its existence, Citizens Union has worked not only for solutions to urgent immediate problems, but also for fundamental structural change.

Citizens Union has appeared as amicus curiae since the beginning of this case, participating at the District Court level, in the first appeal to the Second Circuit in 1983,

again on remand before the District Court, and in the Second Circuit proceeding from which this appeal was taken. All parties consented to the participation of Citizens Union as amicus curiae before the Second Circuit, and all parties except appellant Ponterio have consented to the filing of this brief.

Citizens Union respectfully submits that it offers this Court a unique perspective on the issues raised herein. Citizens Union is non-partisan, has no political power base to defend, and will gain no political advantage from the outcome of this case.

Citizens Union therefore respectfully requests that this Court grant its motion for leave to file the

attached brief as amicus curiae in this case.

Dated: August 3, 1988

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STATEMENT OF INTEREST

Citizens Union's interest in this case is set forth in its Motion For Leave to File Brief Amicus Curiae, to which this Court is respectfully referred.

Its interest, simply put, is to assure that the votes of all citizens of New York City count equally. New Yorkers have the right to expect that decisions of the scope and importance of those made by the Board of Estimate will be made by a body that is composed fairly, in compliance with federal constitutional requirements. It is because we remain convinced that the election of members of the Board does not comply with these requirements that Citizens Union seeks to file this brief amicus curiae.

SUMMARY OF ARGUMENT

The New York City Board of Estimate, an elected body with vast powers over budget, land use, franchise and other important issues affecting each of New York City's more than seven million residents, consists of eight members. Three members, the Mayor, Comptroller and President of the City Council are elected on a citywide basis and each has two votes. The other five members, each with one vote to cast, are the Borough Presidents, elected from districts which range in size from 352,121 residents (the borough of Staten Island) to 2,230,936 residents (the borough of Brooklyn). See Morris v. Board of Estimate, 831 F.2d 384, 385 (2d Cir. 1987).

This configuration patently violates the Equal Protection Clause of the United States Constitution. The gross inequality in population among the districts from which representatives with equal votes are elected violates the one person, one vote principle. The apportionment scheme on which the Board is based is not the product of any attempt, much less a good faith attempt, to comply with substantial voter equality as required by law. Rather, it is the vestige of a turn of the century political arrangement. No state interests can excuse or justify such a clear violation of the Fourteenth Amendment one person, one vote requirement. As the courts below so correctly noted, the state interests put forward by appellants could well

be accommodated in a constitutionally acceptable manner.

The courts below did not seek to impose federal solutions on local government, or interfere with innovative or flexible approaches to governmental design. The courts below simply recognized the obvious: that the disparity in borough population is enormous, and therefore the representational scheme of the Board of Estimate is patently unconstitutional. The Court of Appeals noted that revision of the New York City Charter was already underway, and suggested only temporal guidelines, leaving substance to the local level.

The Board of Estimate exercises a wide range of governmental powers, as cogently set out by the Second Circuit. Morris v. Board of Estimate,

supra, 831 F.2d at 385. As an elected body with general governmental powers, the Board must be structured to comply with the one person, one vote rule. To be constitutionally valid, a state or local apportionment plan must in the first instance and as a driving force be based on population, not geography or other factors.

The Board does not meet this fundamental requirement. The geography driven structure of the Board has remained unchanged since 1901. Rather than be subject to reapportionment periodically, based on changes in population in the districts (boroughs) whose representatives (Borough Presidents) sit on the Board, the number of representatives and the districts which they represent have

not varied for nearly 90 years[1]. This makes the true colors of the Board of Estimate stand out in vivid hue. It is an anachronism, not an innovative institution of "regional" government. In fact, it is not "regional" at all. It is an arm of city government, with many of the powers which other cities vest either in the executive or in the city council, board of supervisors, or the like.

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1 To the extent that the voting scheme of the Board has been changed over the years, the changes have exacerbated, rather than diminished, the constitutional problems. Originally the Borough Presidents of Manhattan and Brooklyn (then the two largest boroughs) had two votes apiece. The citywide members each had three votes, and the other Borough Presidents each had one. In 1958 this was changed to give the citywide members four votes each and each of the Borough Presidents two votes apiece. In 1978 the citywide members were given two votes and each of the Borough Presidents one vote.

The monumental population disparity among the boroughs (Brooklyn's population, 2,230,936, is 6.33 times greater than Staten Island's 352,121) presents the appellants with an insurmountable obstacle. They attempt to divert this Court's attention from this fundamental constitutional infirmity by arguing that the courts below ignored the three citywide members of the Board and determined the issue as if the Board contained only the Borough Presidents. Brief for Municipal Appellants and Appellant Straniere at 31.

Of course, the courts below did not ignore the presence of the citywide members on the Board. In its first decision, the Second Circuit specifically directed the District Court to consider what role, if any,

consideration of the presence of the citywide members should play in assessing the representational disparities on the Board. The District Court carefully considered this issue. Its measurement of the malapportionment of the Board was affirmed by the Second Circuit, the court which had directed the District Court's attention to the impact of the citywide members in the first place.

The courts below correctly held that the citywide members should not be included in the methodology that determined the deviation from equality among the boroughs. They recognized that not only was there substantial precedent to exclude the at-large seats as a factor in measuring the Board's apportionment, but that there were also sound reasons based on the very different interests

to be represented on the Board by the citywide members as opposed to the Borough Presidents. The citywide members represent citywide interests on the Board. The Borough Presidents are supposed to be the representatives of the interests of their respective boroughs. The courts below concluded that excluding the citywide members from any measurement of the Board's malapportionment conforms to the relationship that those representatives have with their electorates[2]. In no sense, then, can the franchise rights of borough citizens in electing citywide officials be deemed to compensate for inter-borough representational

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2 Of course, each of the three citywide officials has responsibilities unique to his or her office. Thus, each official may approach certain Board of Estimate votes from a different perspective.

malapportionment. The effect of the presence of citywide officials on the Board of Estimate is entirely neutral as to the gross disparities in the voting rights of borough citizens. Consequently, the measurement focused on where the inequalities were -- among the boroughs.

Faced with the enormous 132.9% deviation from equality that exists with regard to the ability of residents of different boroughs to impact the election of their Borough Presidents, appellants have instead urged this Court to apply an outcome determinative analysis based on the Banzhaf Index. The appellants' Banzhaf analysis, however, is based on a hypothetical construct properly rejected by the courts below to which this Court should not give credence.

Nor is appellants' romanticized and inaccurate description of the Board of Estimate as an innovative, flexible experiment in regional government more availing. Even if it were true, it is irrelevant and cannot cure the Board's unconstitutional structure. The one person, one vote rule is not rigid and does not prohibit minor deviations from substantial voter equality to achieve compelling local interests. The Board of Estimate violates this constitutional mandate, however, because the deviations are enormous and there has been no attempt to achieve the state interests asserted in a constitutionally acceptable manner. The record conclusively demonstrates that such state interests could be achieved constitutionally.

Accidents of geography and choices of long forgotten boundary makers have no place in determining voting apportionment plans[3]. In fact, the subtle theme running through the submissions of appellants and the amici supporting their position is that the chief state interest in maintaining the scheme is a blatantly impermissible one -- the opportunity for residents of a discrete geographical area to have a vast, disproportionate impact on the lives of their fellow citizens. This is not

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[3] Appellants' ardor carries them a little too far when they profess their fealty to nature. It was not nature, or the Almighty, that skipped across the Harlem River and made Marble Hill, located on the continental United States and contiguous with the Bronx, part of Manhattan. See Bird and Carroll, New York City By Day, N.Y. Times, July 5, 1984, at B4, col. 5. Nor is there a river, or any other natural boundary, separating Brooklyn and Queens.

flexibility. This is not innovation. This is a pure and simple violation of the rights guaranteed by the Equal Protection Clause.

ARGUMENT

THE COURTS BELOW PROPERLY FOUND THAT THE BOARD OF ESTIMATE IS SEVERELY MAL-APPORTIONED AND IN VIOLATION OF THE EQUAL PROTECTION CLAUSE'S GUARANTEE OF SUBSTANTIAL VOTER EQUALITY.

A. The Present Representational Structure Of The Board Of Estimate Violates The Requirement That Governmental Bodies Be Constructed As Nearly As Practicable To Reflect Voter Equality.

This Court has consistently maintained that in formulating representational plans and in creating districts for congressional, state and municipal government elections "the

overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen." Reynolds v. Sims, 377 U.S. 533, 579 (1964). This Court has made it clear that any local governance plan based on elected, representational government must be designed and implemented with the Equal Protection guarantees as its basic premise. To be constitutionally valid, a state or local apportionment plan must be founded on considerations of population, and not geography.

> [T]he basic principle of representative government remains, and must remain, unchanged -- the weight of a citizen's vote cannot be made to depend on where he lives. Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative

apportionment controversies. Reynolds v. Sims, supra, 377 U.S. at 567 (emphasis supplied).

This Court has specifically rejected attempts to insulate local governmental bodies from the standard of substantial voter equality, finding "little difference, in terms of the application of the Equal Protection Clause and of the principles of Reynolds v. Sims, between the exercise of state power through legislatures and its exercise by elected officials in the cities, towns and counties." Avery v. Midland County, 390 U.S. 474, 481 (1968). See also Hadley v. Junior College District, 397 U.S. 50, 56 (1970) ("[W]henever a state or local government decides to select persons by popular election to perform government functions, the Equal Protection Clause of the Fourteenth

Amendment requires that each qualified voter must be given an equal opportunity to participate in the election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as it is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials."); Abate v. Mundt, 403 U.S. 182, 185 (1971) ("It is well established that electoral apportionment must be based on the general principle of population equality and that this principle applies to state and local elections.")

Applying these principles to the facts of this case, the District Court below quite correctly held that the Fourteenth Amendment directs that:

> [A]ny citizen shall have a vote equal to any other citizen -- no matter the borough of either.
>
> * * *
>
> It is a citizen's right -- not a borough's -- which is the equal protection center of attention.

Morris v. Board of Estimate, 647 F.Supp. 1463, 1470 (E.D.N.Y. 1986).

The record and the briefs of appellants and amici supporting them can be searched diligently without finding a single claim that this crucial "starting point" and "controlling criterion" was even considered in devising the Board of Estimate and its electoral configuration. As even appellants must admit, for it is incontrovertibly the case, the New York City Board of Estimate is the vestige of a 1901 political arrangement having nothing to do with

population, executed long before modern principles of "one person, one vote" were expounded.

There is nothing necessarily sinister in the fact that the Board was set up this way nearly ninety years ago. It is wrong to suggest, however, that this historical anachronism has any place in a government that must meet today's constitutional principles.

Not surprisingly, every federal court, including the two below, that has considered the population disparities among New York City's boroughs has found them so great that allocating equal representation to each borough violates the Equal Protection Clause. Morris v. Board of Estimate, 647 F.Supp. 1463 (E.D.N.Y. 1986); Morris v. Board of Estimate, 831 F.2d 384 (2d Cir. 1987); Oliver v.

Board of Education, 306 F.Supp. 1286 (S.D.N.Y. 1969) (invalidating statute constituting City's permanent board of education); Andrews v. Koch, 528 F.Supp. 246 (E.D.N.Y. 1981), aff'd., 688 F.2d 815 (2d Cir. 1982), aff'd. sub. nom. Giacobbe v. Andrews, 459 U.S. 801 (1982) (invalidating election plan for the New York City Council).

Thus this Court could, with no further consideration, reject the current configuration of the Board of Estimate on the sole ground that the Board was not apportioned with population as the "starting point" and "controlling criterion" or even, for that matter, as a factor at all. Even if this Court is not content to do so, however, the plan must fail no matter what other factors are considered.

The Board of Estimate, under New York City's Charter as it is presently

formulated, wields vast power over city government and the lives of each of New York's over 7,000,000 citizens. The Second Circuit recognized this in its opinion below:

> [T]he City of New York ... is to a substantial extent governed by the Board of Estimate.

Morris v. Board of Estimate, supra, 831 F.2d at 385.

The Board combines many duties normally held by the executive or the legislature of a government. The fact that the Board of Estimate does not have all the powers of both the executive and legislative branches of government in no way insulates it from the proscriptions of the one person, one vote rule.

> [W]henever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the

> Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election.

Hadley v. Junior College District, supra, 397 U.S. at 56.

The appellants seek to evade the requirement of substantial voter equality by attempting to minimize the importance of the Board. Appellants speak of the "limited" functions the Board exercises over "extremely local matters." See Brief for Municipal Appellants and Appellant Straniere, at 9-10. See also Jurisdictional Statement of Municipal Appellants and Appellant Straniere at i,5,6. These claims are, as has been demonstrated, unsupported by the evidence as recognized and approved by the courts below. By denigrating the stature of the Board, the appellants hope this

Court will cast a lenient eye over the City's obvious failure to comply with this Court's requirement in Avery and Hadley that local elective bodies have as their underpinning a representational structure based on substantial voter equality.

B. The Gross Deviation From Equality Found Below Was Clearly Correct.

The Borough President of Brooklyn, representing 2,230,936 citizens of the City of New York, and the Borough President of Staten Island, representing 352,121, have the same number of votes -- one -- on the Board of Estimate. See Morris v. Board of Estimate, supra, 831 F.2d at 385. Applying the Abate test, the courts below added the largest deviation above equality, +75.2%, to

the largest deviation below equality, -57.7%, to arrive at a maximum deviation from equality of 132.9%. Id. at 386. There can be no dispute that such a deviation is intolerable, far in excess of anything that this Court has ever allowed.

It is the electoral power of each citizen of the governmental unit in question (here New York City) that this Court has held is the proper basis of analysis. Recognizing this, the Second Circuit held below, and Citizens Union agrees, that:

> [T]he proper inquiry in cases such as this is into the relative power of voters to elect representatives.

Morris v. Board of Estimate, supra, 831 F. 2d at 389. On the basis of this type of analysis, there can be little argument that the individual Staten Island voter has a far greater

power to elect his representative than any other citizen of New York -- more than six times as much power as a New Yorker who resides in Brooklyn.

Realizing that they must fail if this Court retains this "power to elect" analysis, appellants instead urge this Court to turn their backs on the established precedent. They argue that it is not a voter's ability to elect a representative, but rather his theoretical ability to effect the outcome of a particular vote of the Board itself that really matters. Thus, they contend that the at-large votes of citywide members on the Board should be factored into the malapportionment computation using the Banzhaf Index. Citizens Union believes that engaging in such outcome analysis completely ignores the realities of the political process.

See Morris v. Board of Estimate, supra, 831 F.2d at 389-91, citing Whitcomb v. Chavis, 403 U.S. 124 (1971).

Far from ignoring the relevance of the at-large votes to the Board's representational structure, as appellants suggest, the courts below rigorously examined the relevance of at-large voting to the Board's malapportionment. Both courts carefully examined appellants' claim that the equal ability of all New York citizens to elect the at-large members compensates for representational disparities at the level of borough representation, and properly rejected it. Recognizing that "it is undoubtedly the case that a representative will seek especially to advance the interests of those whose votes elect him or her," Morris v.

Board of Estimate, supra, 831 F.2d at 392, the Court of Appeals, affirming the conclusion of the District Court, found that the citywide and borough representatives serve different constituencies requiring separate treatment for purposes of apportionment analysis.

> [T]he Board's members primarily represent the interests of the different constituencies that elect them. The Borough Presidents sit on the Board of Estimate as representatives of the special concerns their constituents have qua residents of a particular borough. The citywide members, on the other hand, must be supposed to transcend such purely local interests of their constituents qua residents of New York City.

Id.

Judge Newman, in his concurrence, did suggest that at some point the voting power of at-large members compared to that of district members

could be relevant and even decisive on the issue of constitutionally valid apportionment. He made clear, however, that this was not such a case:

> In our case, I agree that at-large voting power of six out of eleven on most issues and four out of nine on budget issues is not sufficient to permit us to ignore the substantial aggregate deviation of the five boroughs that each send one representative to the New York City Board of Estimate.

Morris v. Board of Estimate, supra, 831 F.2d at 395.

There are a number of reasons why this Court should re-affirm its earlier holdings and reject outcome determinative analysis and the Banzhaf Index, particularly. This Court has already recognized the limitations of the Banzhaf analysis, stating that it is "theoretical" and fails to consider

> any political or other factors which might affect the actual voting power of the residents, which might include party affiliation, race, previous voting characteristics or any other factors which go into the entire political voting situation.

Whitcomb v. Chavis, 403 U.S. 124, 145-146 (1971).

Applying this analysis to the Board of Estimate, the Second Circuit correctly stated:

> It [the Banzhaf Index] is unrealistic in a general sense involving voter motivation; and it is unrealistic in a particular sense as it applies to citizen voting power through the Board of Estimate.

Morris v. Board of Estimate, supra, 831 F.2d at 390.

First, it includes in its methodology the presence of the citywide members, which, as just discussed, the courts below properly

rejected. Second, it attempts to allocate the citywide members' votes to the voters of the various boroughs by means of a purely theoretical and unrealistic formula.[4] The appellants state in their brief that there are "552 possible voting combinations in which any one member can affect the outcome of a vote," Brief for Municipal Appellants and Appellant Straniere at 35, and that these "combinations" must all be factored into their Banzhaf analysis. Each of these "combinations" is given the same weight and possibility of occurrence as any other.

Inconsistently, appellants assert that one of the Board of Estimate's

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[4] Complicated mathematical formulas do not in and of themselves reflect a sophisticated insight. They often, as here, confuse and overly complicate a simple issue.

great strengths, and a prime example of the efficiency which they assert justifies the denial of constitutional rights to the majority of New York City's residents, is its "collegiality." This "collegiality," according to the appellants, is epitomized by the tradition of borough president deference. Under this policy, each Borough President often controls the votes of all five Borough Presidents on issues of local importance. Thus, because the Mayor cannot vote on budget issues, the Borough President of Staten Island, representing only 352,121 of New York's more than 7,000,000 residents, has the power to control certain City budget items completely by himself. Morris v. Board of Estimate, supra, 831 F.2d at 391. Even on non-budget matters, borough president deference

means that all five of the Borough Presidents vote alike on many matters. Thus, as found by the Second Circuit, the "552 possible voting combinations" posited by appellants is purely theoretical, and afford no basis for any kind of analysis of voter equality for the New York Board of Estimate. Morris v. Board of Estimate, supra, 831 F.2d at 390-391.

Even supposing that the alternative methodology was otherwise flawless, the resulting deviation even under the Banzhaf analysis would still be 31% (See Morris v. Board of Estimate, supra, 831 F.2d at 387 fn. 2), well in excess of the 16.4% that this Court suggested might be the outer limit of permissible deviation. Mahan v. Howell, 410 U.S. 315, 329 (1973).

C. No Legitimate State Interest Exists To Justify The Current Structure Of The Board Of Estimate.

No legitimate state policy requires that this Court ignore the gross inequality that exists on the New York City Board of Estimate. Indeed, the Board is terribly flawed, and would be properly subject to change on policy grounds regardless of its constitutional infirmities.

Appellants offer several alleged state interests which they claim should override the constitutional rights of New York's citizens. Their main themes, which run throughout their brief, are that New York City is actually a "region" and that good government requires that the Board of Estimate be maintained in its present form. Neither premise is true.

New York City, although large, is a municipality, not a region. All its citizens pay taxes at the same rates, wherever they live. All are protected by the same police and fire departments. Decisions made by the Board affect all citizens equally. The decision to locate a new firehouse in Staten Island may seem at first blush like a local issue, but it means that the City has elected to spend some of its limited resources there, and thus not somewhere else. The cost of construction is borne as equally by citizens of the Bronx, miles from the new firehouse, as the residents of Staten Island.

As for the appellants' romanticized description of the Board, it is for the most part unencumbered by references to the record. Further, Citizens Union by no means concedes

that the Board's effectiveness can be taken for granted. The Board of Estimate has had its successes; it has also had its failures, as those who read the daily press have been only too acutely aware in recent months.

To the extent the City believes effective government in New York requires some blending of citywide and borough representation, that is not threatened by this litigation.[5] The City may constitutionally create a system of government which combines citywide and borough representatives and still provide for substantial voter equality at the level of borough representation. If this Court affirms

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[5] In the Brief for Municipal Appellants and Appellant Straniere, at 23, appellants incorrectly assert that "the courts below found that the Board's blending of citywide and local representation is inconsistent with the principle of one person, one vote."

the decisions below, the City can, if it feels it necessary, continue to recognize geographic/political subdivisions, but in a constitutional way. There is only one aspect of New York government which is, in fact, threatened by a ruling that the Board is unconstitutionally configured, namely, an attempt to promote borough interests equally, at the expense of citizen interests.[6]

The appellants have argued that in order to preserve "meaningful participation" by Staten Island as a borough in the Board's decisions, it is necessary to grant Staten Island's representative the same voting power as the representative of each of its

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[6] The City, of course, "bear(s) the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal." Karcher v. Daggett, 462 U.S. 725, 731 (1983).

much more populous neighbors, so that Staten Island will not become a "bystander" in city government. But Staten Island has no rights under the Constitution. Its residents do -- but no more or less than their neighbors in other boroughs. This Court made it clear in Reynolds v. Sims that "[l]egislators represent people, not trees or acres." 377 U.S. at 562. The Second Circuit recognized this, stating, "the Equal Protection clause requires the equalization of voter representation, not interest representation." Morris v. Board of Estimate, supra, 831 F.2d at 392. As this Court observed:

> [P]ermitting deviations from population-based representation does not mean that each local governmental unit or political subdivision can be given separate representation, regardless of population...Such a

> result, we conclude, would be constitutionally impermissible.

Reynolds v. Sims, supra, 377 U.S. at 581.

That the result of reapportioning the Board's representational structure would diminish the power of smaller boroughs -- qua borough -- is, as the Second Circuit properly acknowledged, a fact of democratic life: "the fact that a minority may regularly be overshadowed by its more populous neighbors under a proportional voting scheme is one characteristic of a representative democracy." Morris v. Board of Estimate, 707 F.2d 686, 691 (2d Cir. 1983).

Similarly, appellants' invocation of the need for "innovation" and "flexibility" in structuring municipal government is disingenuous. First, as noted, Citizens Union believes the

very existence of the Board -- and of its members' desire to maintain power -- stifles innovation. Moreover, as this Court noted:

> [T]he Constitution and this Court are not roadblocks in the path of innovation, experiment, and development among units of local government...Our decision today is only that the Constitution imposes one ground rule for the development of arrangements of local government: a requirement that units with general governmental powers over an entire geographic area not be apportioned among single-member districts of substantially unequal population.

Avery v. Midland County, supra, 390 U.S. at 485-86. As properly noted by the Second Circuit, "[s]o long as the requirements of the Equal Protection Clause are met, each locality is free to develop the system of governance which best accords with its needs."

Morris v. Board of Estimate, supra, 707 F.2d at 691.

Finally, to the extent that appellants' position depends on a perception by this Court that the Board of Estimate is a miracle of local governance that deserves not to be tinkered with, that position must fail. The Board is hardly the fair and efficient institution the appellants seek to portray. The Board is subject to criticism in terms of its institutional efficiency, for with a mere eight members it must attempt to cope with the hundreds of items regularly on its docket. (JA54-190.) The Board is also subject to criticism for being undemocratic and unresponsive, conducting its business in secret sessions which frustrate public participation in the decisionmaking process. See Farr,

Liebman and Wood, Decentralizing City Government at 16-17. The Board's structure has also been criticized for failing to serve the interests of minorities in New York City. As the affidavits of Herman Badillo (JA240), Wendell Foster (JA248), and Edward Sadowsky (JA251) indicate, the individual boroughs of New York City are comprised of numerous discrete neighborhoods of different racial, economic and political elements. Former Borough President Badillo made it clear:

> [E]ach borough is so heterogeneous with respect to economic, religious, racial and ethnic disparities that neighborhoods which lie within each borough have dramatically opposed interests. Under the present scheme local interests are no longer effectively represented.

(JA242.)

It does not particularly lie within this Court's purview to decide whether the Board of Estimate is, overall, a "good" or "bad" institution of city government. The Board is neither a wonderfully efficient nor particularly democratic body.

Even if the Board did perform well, however, "the Constitution does not permit a State to relegate considerations of equality to secondary status and reserve as the primary goal of apportionment the service of some other state interest." Mahan v. Howell, supra, 410 U.S. at 340.

This Court need not, however, choose principle over practicality. Innovation is not inconsistent with the Constitution. New York City may constitutionally blend citywide and borough representation if it feels it

necessary, without overriding the constitutional requirement of substantial voter equality. It may not do one thing -- grant the voters of certain geographic subdivisions substantially greater voting power than that of voters from other geographic subdivisions. In fact, a ruling from this Court that the present Board of Estimate is impermissibly configured will require innovation, allowing the Charter Revision Commission, a body already in place and functioning, to craft a system compatible both with the Constitution and the needs of New York City as it approaches the twenty-first century.

CONCLUSION

For the reasons stated above the decision of the Second Circuit should be affirmed.

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Respectfully submitted,

/s/John V. Lindsay

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